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In the Supreme Court of the United States

OCTOBER TERM, 1980

SHEILA RENDELL-BAKER,
PETITIONER,

v.

SANDRA KOHN, ET AL.,
RESPONDENTS,

WAYNE KLUG, ET AL.,
PETITIONERS,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Is an ostensibly private school, to which local governments have delegated their statutory obligation to provide public education to special needs children at public expense and which is subject to extensive state regulation, subject to any constitutional constraints in connection with the provision of such education?

PARTIES BELOW

The Court of Appeals for the First Circuit consolidated these two appeals from the District Court for the District of Massachusetts. In No. 80-1328 below, the plaintiff-appellant was Sheila Rendell-Baker; the defendants-appellees were New Perspectives School, Inc., Sandra Kohn (individually and as director of the school), the members of the Board of Directors of the school (individually and in their official capacities),[1] Francis X. Bellotti (as Chairman of the Massachusetts Committee on Criminal Justice), and

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[1]The individual members of the school's Board of Directors named in the Rendell-Baker Complaint were Susan Alford, John Businger, Jackie W. Cooper, Stephen B. Goldenberg, Rodney Jackson, Joanne Neiman, James W. Schlesinger, Rina Wald Spence, Tonia Yee, and Edward Zarsky.

William Highgas[2] (as Executive Director of the Massachusetts Committee on Criminal Justice). In No. 80-1451 below, the plaintiffs-appellees were Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca; the defendants-appellants were New Perspectives School, Inc., Sandra Kohn (individually and as director of the school), and the members of the Board of Directors of the school (individually and in their official capacities).[3]

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[2]William Highgas was substituted as a named party after he succeeded Robert J. Kane, who was originally named in the Complaint, as Executive Director of the Commonwealth of Massachusetts Committee on Criminal Justice.

[3]The individual members of the School's Board of Directors named in the Klug complaint were James W. Schlesinger, Stephen B. Goldenberg, Joseph Gartner, Joanne Neiman, David Bachrach, Rodney Jackson, Rita Wald Spence, Susan Alford, Rhoda Goodwin, Rita Hamberg, Tonia Yee, and Edward Zarsky.

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OPINIONS BELOW

The opinion of the court of appeals for both cases, as consolidated on appeal, is reported at 641 F.2d 14 (1st Cir. 1981) and appears in the Appendix hereto at 1. The Memorandum and Order of the District Court for the District of Massachusetts in Rendell-Baker v. Kohn, et al., No. 80-1328 below, is reported at 488 F. Supp. 764 (D. Mass. 1980) and appears in the Appendix hereto at 27. The April 7, 1980 Memorandum and Order of the District Court for the District of Massachusetts in Klug, et al. v. New Perspectives School, Inc., et al., No. 80-1451 below, is not reported and appears in the Appendix hereto at 39.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered in both appeals below on February 12, 1981. On May 4, 1981, this Court granted the petitioners' motion for an extension of time until June 12, 1981, within which to petition for certiorari. See 28 U.S.C.A. § 2101(c) (West 1958). This petition was filed on or before June 12, 1981. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1) (West 1966).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech ....

United States Constitution, Amendment V:

> No person shall ... be deprived of life, liberty, or property, without due process of law ....

United States Constitution, Amendment XIV:

> Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code Annotated, Title 42, Section 1983 (West Supp. 1981):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Mass. Gen. Laws Ann., ch. 71B, § 3 (West Supp. 1981):

> ... [T]he school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided ....

Mass. Gen. Laws Ann., ch. 71B, § 4 (West Supp. 1981):

> The school committee of any city, town or school district may, to meet its obligations under section three, ... subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, ... enter into an agreement with any public or private school, agency, or institution to provide the necessary special education within the city, town or school district.

Mass. Gen. Laws Ann., ch. 71B, § 5 (West Supp. 1981):

Any school committee which provides or arranges for the provision of special education pursuant to the provisions of section three shall pay for such special education personnel, materials and equipment, tuition, room and board, transportation, rent and consultant services as are necessary for the provision of such special education.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SHEILA RENDELL-BAKER,

Petitioner,

v.

SANDRA KOHN, ET AL.,

Respondents.

Petition For a Writ of Certiorari
to the United States Court of
Appeals for the First Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in the above-entitled case on February 12, 1981.

STATEMENT OF THE CASE

This petition for a writ of certiorari concerns two cases which involve closely related issues and which were consolidated on appeal by the United States Court of Appeals for the First Circuit.

Petitioner in the first case is Sheila Rendell-Baker, a former teacher and vocational counselor at the New Perspectives School, Inc. (hereinafter the "School"), one of the respondents herein. Ms. Rendell-Baker filed her complaint on July 28, 1977. She alleged, among other things, that the School, acting under color of state law and in violation of her rights under the First, Fifth, and Fourteenth Amendments and 42 U.S.C.A. § 1983

(West Supp. 1981), dismissed her on January 3, 1977, without notice or hearing, in retaliation for her speech in support of a student petition concerning matters of school policy. Also named as defendants were members of the School's Board of Directors; Francis X. Bellotti,[4] in his capacity as Chairman of the Massachusetts Committee on Criminal Justice (hereinafter "MCCJ");[5] Robert J. Kane, former Executive Director of MCCJ;[6] and certain federal officials, in their capacity as

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[4]Mr. Bellotti is also Attorney General of the Commonwealth of Massachusetts.

[5]The MCCJ is a state agency which, among its other duties, distributes funds received from the federal Law Enforcement Assistance Administration. Mass. Gen. Laws Ann. ch. 6, § 156 (West 1976 & Supp. 1981).

[6]While the case was pending in the district court, Mr. William Highgas replaced Mr. Kane as Executive Director and was duly substituted as a defendant.

officials of the Law Enforcement Assistance Administration (hereinafter "LEAA").[7] Jurisdiction was invoked pursuant to 28 U.S.C.A. §§ 1331, 1343, and 1361 (West Supp. 1980, 1976 & 1976). On April 16, 1980, the district court (Caffrey, C.J.) granted summary judgment in favor of all defendants, on the ground that the School's dismissal of Ms. Rendell-Baker did not involve state action. Summary judgment was affirmed by the United States Court of Appeals for the First Circuit in an opinion dated February 12, 1981.

Petitioners in the second case are five former teachers and counselors[8] at

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[7]The federal defendants were dismissed by order of the district court, and petitioners herein do not challenge that dismissal.

[8]Petitioners are Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca.

the School. These five petitioners also claim that they were dismissed, in June, 1978, for their support of student speech and educational rights and for their other speech critical of school policy and administration, all in violation of their rights under the First, Fifth, and Fourteenth Amendments and 42 U.S.C.A. § 1983 (West Supp. 1981). Suit was commenced against the School and each of its directors on September 12, 1978. Jurisdiction was invoked pursuant to 28 U.S.C.A. §§ 1331, 1343, and 1361 (West Supp. 1980, 1976 & 1976). On April 7, 1980, the district court (Mazzone, D.J.) denied defendants' motion to dismiss, holding that there was "sufficient involvement by the state to meet the jurisdictional challenge...." (App. 54) The First Circuit Court of Appeals granted

leave to file an interlocutory appeal under 28 U.S.C.A. § 1292 (b) (West 1966) and consolidated the Klug appeal with the Rendell-Baker appeal. In the same opinion that affirmed the judgment in Rendell-Baker, the court of appeals reversed the order denying defendants' motion to dismiss in Klug, with directions that judgment be entered dismissing the complaint.

To understand the nature of the petitioners' claims that the School acted "under color of state law" when it dismissed them for their speech, one must recognize the vital role of the School in the provision of public education under Massachusetts law. Under Massachusetts law, all special needs students have an entitlement to a publicly-funded education under the supervision of the state and local governments. As the Massachusetts

Supreme Judicial Court reaffirmed recently, Chapter 766 of the Massachusetts Acts of 1972, codified at Mass. Gen. Laws Ann. ch. 71B (West Supp. 1981), and the regulations promulgated thereunder, 603 Code Mass. Regs. § 28 et seq. (1979), create "a comprehensive and complete program of evaluation and placement for children with special education needs." Commonwealth v. School Committee of Springfield, Mass. Adv. Sh. [1981] 502, 504, 417 N.E.2d 408, 409-10, quoting Board of Education v. Assessor of Worcester, 368 Mass. 511, 515, 333 N.E.2d 450, 453 (1975).

Under the statute, the school committee of every city, town or school district must identify all children between the ages of three and twenty-one who, because of temporary or permanent

physical or emotional disability, have special educational needs; diagnose and evaluate the special needs of each such child; prepare an individualized educational program tailored to meet those needs; and implement or arrange for the implementation of that individualized program. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981). Depending upon the needs of the child, the program may consist of as little as additional, in-class assistance or as much as teaching, treatment, and occupational training in a long-term residential school. Mass. Gen. Laws Ann. ch. 71B, § 2 (West Supp. 1981). School districts may offer special programs themselves, through existing public schools, or they may contract with private schools to implement such programs. Mass. Gen. Laws Ann. ch. 71B, § 4 (West Supp.

1981). However, under the regulations, the school district must provide special education programs in the least restrictive environment possible. 603 Code Mass. Regs. § 28, ch. 3, par. 322.2 (1979). "The statute impliedly requires, and the regulations explicitly mandate, public school education to the maximum extent possible; private school placements are permitted only as a necessary alternative." Commonwealth v. School Committee of Springfield, Mass. Adv. Sh. [1981] at 505-506, 417 N.E.2d at 408.

If the school committee decides to place the special needs child in a private school, there must be a review of that decision at least once every three months to determine if the child can be transferred to a less restrictive environment, such as a regular public school. 603 Code

Mass. Regs. § 28, ch. 3, pars. 502.4(c), 804.2 (1979). While the child is at a private school, the school committee must monitor the child's educational progress, Mass. Gen. Laws Ann. ch. 71B, §§ 2, 3 (West Supp. 1981), with a view toward returning the child to a regular course of instruction in a public school as soon as possible. Id. A private school which accepts a special needs child assigned by a school committee is required to agree to implement the special educational program designed for the child and to comply with the detailed regulations promulgated under the statute. 603 Code Mass. Regs. § 28, ch. 3, pars. 804.0-804.6 (1979). The school committee of the city, town or school district which assigns a special needs child to a private school is required to bear the expenses associated

with that placement. Mass. Gen. Laws Ann. ch. 71B, § 5 (West Supp. 1981). In no event may a parent or guardian be charged for the provision of a special education program to a child. Mass. Gen. Laws Ann. ch. 71B, § 10 (West Supp. 1981).

Against this background the petitioners herein assert that the School acted under color of state law when it dismissed them from their positions as teachers and counselors for supporting student rights and criticizing school policies and administration. The School is a small non-profit institution which provides a high school program to approximately 50 students who are unable to function in a normal high school setting. It is located on privately-owned

land in the Town of Brookline, Massachusetts, and is organized under the laws of the Commonwealth of Massachusetts. Operation of the School is under the control of a Board of Directors, none of whose members is a government official or appointed by a governmental body.

As of 1978, all 50 students enrolled at the School had alcohol, drug or behavioral problems or other special needs, and had been placed in the School pursuant to Mass. Gen. Laws Ann. ch. 71B by the Town of Brookline or the City of Boston, or by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. All were attending on a tuition-free basis. The students received a diploma certified by the Town of Brookline School Committee upon graduation. The Town of Brookline

maintained no suitable facilities for educating these students within its traditional public schools.[9]

In fiscal year 1975-76, 91% of the School's funding came from public sources. In fiscal year 1976-77, public sources accounted for 99% of the School's funds. A portion of these funds was provided by the LEAA under a grant which was channeled to the School through the MCCJ. The grant was to fund a vocational counseling and placement program at the School during the years 1976 and 1977. Ms. Rendell-Baker's position was funded by this grant.

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[9]Although the court of appeals found no support in the record for this assertion, 641 F.2d at 17, n.2 (App. 3-4, n.2), the affidavit of Wayne Klug, which was a part of the record below, stated, at paragraph 3: "The Town of Brookline, from which a large number of the School's students come, has no educational programs which can meet the special needs of the students which it refers to the School, within its public school system."

On December 2, 1976, students at the School petitioned its Board of Directors seeking reinstitution of the prior role played by the Student-Staff Council in personnel decisions at the School. Ms. Rendell-Baker spoke in favor of the student petition, which was opposed by the School's Director, Sandra Kohn. On January 3, 1977, according to the complaint, Ms. Kohn fired Ms. Rendell-Baker for expressing an opinion contrary to her own. Before notifying Ms. Rendell-Baker that she was to be discharged, Ms. Kohn advised the MCCJ of her intentions. After the dismissal, the MCCJ advised the School that it would not approve the hiring of a replacement for Ms. Rendell-Baker until the School provided a satisfactory explanation to the MCCJ for the

dismissal. The School provided an explanation and, by letter to the School dated March 29, 1977, the MCCJ indicated its satisfaction with that explanation. Ms. Rendell-Baker filed suit a few months later.

The dismissals in the Klug case occurred in June, 1978, shortly after petitioners had complained privately to the School's Board of Directors and publicly in a letter to the Brookline Chronicle about certain aspects of the School and its administration. The criticism which led to the dismissals in the Klug case, like that in the Rendell-Baker case, related directly to the performance by the School of its duties as a provider of educational services under Mass. Gen. Laws Ann. ch. 71B.

As noted, the Court of Appeals for the First Circuit held that the School did not act under color of state law in discharging the petitioners. Accordingly, it affirmed summary judgment in favor of defendants in Rendell-Baker and reversed the order denying defendants' motion to dismiss in Klug.

REASONS FOR GRANTING THE WRIT

This petition for a writ of certiorari should be allowed because the court of appeals decided an important question of federal law which has not been, but should be, settled by the Supreme Court. Also, to the extent this Court and other federal courts have addressed related questions, the decisions have conflicted, in principle, with the decision of the court of appeals in this case.

1. This Case Presents an Important, Unsettled Question of Federal Law.

In recent years, this Court has often addressed the question of whether conduct of an ostensibly private institution could be attributed to the state. E.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Evans v. Newton, 382 U.S. 296 (1966); Moose Lodge No. 107 v. Irvis, 407

U.S. 163 (1972); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978). However, the present case raises an important federal question which does not appear to have been addressed. That question is whether an ostensibly private school becomes subject to any constitutional constraints when it accepts the delegation of a major portion of the state's statutory obligation to provide public education. A review of this Court's prior "state action" decisions will assist in an appreciation of the novelty of this question. A brief discussion of the increasingly important role which private schools have come to play in the provision of public education, in Massachusetts and elsewhere, under statutes like Mass. Gen. Laws Ann. ch.

71B will assist in an appreciation of the question's significance.

A. The Question Presented is Unsettled.

To place the following review of prior cases in context, it should be emphasized at the outset that this case does not raise the broader question whether elementary and high school education is so inherently affected with a public interest that all private schools which provide such education should be held to the same constitutional standards as public schools. The point which distinguishes the present case is that the private school involved here was providing public, not private, education, in the sense that students who attended the School had been placed there by a state agency and local school committees to obtain, at public expense and subject to

public regulation and oversight, the education to which they were entitled under state law. See, e.g., Commonwealth v. School Committee of Springfield, Mass. Adv. Sh. [1981] 502, 515, 417 N.E.2d 408, 415 ("The statute's purpose is, primarily, to help specified children with special needs obtain the education which is theirs by right.").

It should also be emphasized at the outset that the present case does not raise the question whether a private school becomes a state actor for all purposes when local governments delegate to it their obligation to provide public education. The present case raises only the question whether the private school becomes a state actor in connection with activities directly related to the manner in which it performs that delegated

function. For example, a school could be acting under color of law in dismissing teachers for criticizing educational policy and not be acting under color of law in dismissing teachers for complaining about the inadequacy of the school's parking facilities, since the adequacy of a school's parking facilities bears little, if any, relationship to the provision of public education by the school.

Finally, it should be emphasized that the present case does not raise the question whether the activities of a private entity become infused with state action whenever the private entity receives public funds or is subject to public regulation, or both. Again, the overriding factor which distinguishes the present case is that the private school here is not only publicly funded and regulated,

but it has assumed the local government's own obligation to provide public education at public expense to the students assigned to the school by a state agency and local school committees.

A review of leading Supreme Court cases in this area quickly reveals that none has dealt directly with the important question presented in this case. For example, the question presented in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), was whether the state had become so involved in the affairs of a private entity that the activities of the private entity became imbued with state action. After a thorough sifting of the facts and circumstances, the Court concluded that the state parking authority had so insinuated itself into the private business affairs of its restaurant lessee

that the discriminatory practices of the restaurant could fairly be attributed to the state. The present case essentially raises the converse question: May the state, by paying a private contractor to provide a public service which the state would otherwise be required to provide, so disassociate itself from the provision of that public service that the private entity to which the state delegates authority avoids all constitutional scrutiny of the manner in which it provides that service?

This distinction has great significance. When, as in Burton, the question is whether the state has so far insinuated itself into private conduct that the private conduct becomes, in effect, the conduct of the state, the more the state intrudes, through regulation or subsidy,

the more appropriate it is to find state action. It is therefore not at all surprising, in light of cases such as Burton, that lower federal courts, in evaluating allegations of state action, routinely analyze the extent and depth of the state's involvement in the private conduct. See, e.g., Downs v. Sawtelle, 574 F.2d 1, 6-8 (1st Cir.), cert. denied, 439 U.S. 910 (1978); Braden v. University of Pittsburgh, 552 F.2d 948, 958-62 (3d Cir. 1977); Berrios v. Inter American University, 535 F.2d 1330, 1332 (1st Cir. 1976); Weise v. Syracuse University, 522 F.2d 397, 406-08 (2d Cir. 1975); Cohen v. Illinois Institute of Technology, 524 F.2d 818, 824-27 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976). Such a mode of analysis is simply inadequate, however, when the governmental entity has not

insinuated itself into private affairs but rather has attempted to shed authority and responsibility by paying others to perform tasks which it would otherwise be obligated to perform. To say that there is no state action under such circumstances because there is little or no state involvement in the way the private contractor exercises the authority delegated to it by the state is to beg the question.

Apparently, however, the First Circuit failed to appreciate this distinction because it mistakenly employed a mode of analysis more suited to a Burton type "insinuation" case than to the "delegation" case before it. Thus, the court stated that in order "to find that an otherwise privately operated institution is so dominated by the state that all its actions occur 'under color of state law,'

we must find that the state actually does control the institution, not just that it could do so." 641 F.2d at 25 (App. 19). In the same vein, the court stated:

> For purposes of this case, it is particularly important that none of the state agencies involved has undertaken to regulate the school's personnel policies, except to require that its policies be set forth in writing. The content of the school's personnel policies, including criteria and procedures for hiring and firing, has been left to the discretion of the school's management. Id. (App. 20-21) (Footnote omitted).

This passage demonstrates the fundamental error in the First Circuit's analysis. When, as here, the case concerns the state's delegation of its statutory duties to a private entity, the fact that there has been a total rather than a partial abdication of authority should not be a basis for rejecting a claim of state action.

In some respects, Evans v. Newton, 382 U.S. 296 (1966), came closer to addressing the question presented in the case at bar. There, the City of Macon, Georgia, attempted to resign as trustee of a park established under the will of Senator Bacon so that private trustees, who were expected to continue operating the park as a segregated facility, could be appointed. The Supreme Court reversed a state court judgment which would have permitted such substitution. The Court stated:

> [W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations. 382 U.S. at 299.[10]

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[10]The Court noted, however, that a private entity such as a school does not assume all the

(Footnote 10 continued on next page)

Although this principle certainly appears applicable here, the peculiar fact situation in Newton has generated some uncertainty as to the scope of the decision.[11] Thus, in the present case, the First Circuit construed Newton as standing for the narrow proposition that a state may not create a "sham private entity," 641 F.2d at 24 (App. 17), for the "actual purpose of evading constitutional requirements."

(Footnote 10 continued from previous page)

constitutional obligations of the state just because it performs the parallel function of providing private education. 382 U.S. at 300. The present case raises the very different issue of whether a private school which is paid by an arm of the state to provide public education thereby assumes the constitutional obligations of the state in connection with its provision of such public education.

[11] This Court itself has stated that ". . . Newton rests on a finding of ordinary state action under extraordinary circumstances." Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 159, n.8 (1978).

Id. at 23 (App. 16). Because of this uncertainty, Newton did not settle the question presented here.

Newton also left the question unsettled because it concerned the extent to which the state had insinuated itself into a facility whose origin was private, not public. As Justice Harlan noted in dissent: "Beaconsfield had its origin not in any significant governmental action but rather in the personal social philosophy of Senator Bacon and on property owned by him." 382 U.S. at 316-17 (Footnote omitted). Thus, whether one agrees or disagrees with the suggestion by some commentators that the decision in Newton reflected a recognition that the provision of park facilities is an essential public function, Newton was not a case where, as here, a city which was under a statutory

obligation to provide a public service at public expense elected to delegate its obligation to a private contractor.[12]

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), further explored the question considered in Burton of how much state involvement in private conduct was required before the conduct became imbued with state action. Again, the Court did not consider the very different question of whether the state could delegate its statutory duty unencumbered by the constitutional obligations which would have

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[12]However, if those had been the facts in Newton, and if the private contractor hired by the City of Macon to provide the parks which Macon was required to provide had attempted to exclude blacks, or, for that matter, speakers whose viewpoints conflicted with those of the private contractor, the arguments in favor of state action would undoubtedly have been even more compelling, no matter how benevolent the city's motive in delegating its authority to the private contractor. See Norwood v. Harrison, 413 U.S. 455 (1973), discussed infra at 51 - 57.

been associated with the performance of that duty if the duty had not been delegated. Thus, as the Court noted, Moose Lodge No. 107 did not "discharge[] a function or perform[] a service that would otherwise in all likelihood be performed by the State." 407 U.S. at 175.

The significant distinction between the two questions was recognized in another leading state action decision, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Although the Court did not find state action in the termination of a customer's power by a private utility, without notice or hearing, the Court stated:

> If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish

> service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty. 419 U.S. at 352-53.[13]

As this passage illustrates, this Court has indeed recognized that the mode of analysis employed in cases where the state has chosen to become involved in private activity is not necessarily appropriate where the state has chosen to delegate

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[13] In light of this observation, it is particularly significant that the Massachusetts Supreme Judicial Court has interpreted Mass. Gen. Laws Ann. ch. 71B as imposing an obligation on local school committees to "provide an appropriate, publicly supported education to each school-age child with special needs." Commonwealth v. School Committee of Springfield, Mass. Adv. Sh. [1981] 502, 504-5, 417 N.E.2d 408, 410. Unlike the electrical power furnished by the public utility in Jackson, special education programs in Massachusetts are publicly funded, whether they are provided directly by the local government or indirectly through a private school.

public authority. For this reason, Jackson also does not settle the question raised in the present case.

Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), unlike all the preceding cases discussed, with the possible exception of Evans v. Newton, 382 U.S. 296 (1966), was a case which did involve the asserted delegation of sovereign power to a private entity. In Flagg Bros., the Court declined to find that a New York law which permitted a warehouse to enforce its lien for storage charges through a sale of stored property involved state action. Respondents had argued that the actions of the warehouse were attributable to the state because the state had delegated its dispute resolution function to warehousemen. Although the Court rejected this argument on the ground that dispute resolution had never traditionally been an

exclusive state function, the Court noted that it was expressing "no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions [as education...] and thereby avoid the strictures of the Fourteenth Amendment." 436 U.S. at 163, 164. Although the present case is distinguishable on several grounds,[14] it does raise this very question left unanswered by Flagg Bros.

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[14]For example, the present case involves a complete delegation by the state of its responsibility for the dismissal of special education teachers. Even in Flagg Bros., the state retained its authority to resolve post-sale claims for damages based upon unlawful sales. N.Y. U.C.C. § 2-710(9) (McKinney 1964). Also, in the present case, the state had a duty to provide special education, whereas, in Flagg Bros., there was, at most, only an expectation that the state would resolve private disputes. When the claim of state action relates to a function which the state is obligated to perform, rather than to a function as

(Footnote 14 continued on next page)

B. The Question Presented is Important.

Just as it is beyond dispute that the federal question presented in this case is unsettled, it is similarly beyond dispute that this federal question is an important one, because of both the number of persons

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(Footnote 14 continued from previous page)

to which there is only an expectation of performance, tradition and exclusivity should not be considered essential. This is because tradition and exclusivity are significant only insofar as they give rise to a reasonable expectation that the state will continue to provide a service which it had always provided in the past. This expectation, in turn, gives rise to the further expectation that the service will continue to be provided in accordance with constitutional requirements. It is this latter expectation which the law deems worthy of recognition and fulfillment. However, when a state statute mandates that a service be provided, then regardless of whether the service had been provided by the state in the past, society has not just an expectation that the state will provide the service, but an entitlement to that service. This entitlement itself gives rise to an expectation that constitutional requirements will be observed, which expectation is at least as worthy of recognition and fulfillment as the expectation associated with tradition and exclusivity.

affected and the nature of the rights involved.

In Massachusetts alone, 140,000 children receive some kind of special education services under Mass. Gen. Laws Ann. ch. 71B, and more than 5,500 of those children are placed in so-called "private" day schools or residential programs. Commonwealth v. School Committee of Springfield, Mass. Adv. Sh. [1981] 502, 507, n. 8, 417 N.E.2d 408, 411, n. 8. Moreover, the question is not one confined to Massachusetts. Virtually every state in the nation makes some provision in state law for the obligation to educate similar special needs, exceptional or handicapped children.[15] The overwhelming majority of the states clearly allow this obligation

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[15] A compendium of statutes appears in the Appendix at 85-88.

to be delegated to private entities such as the school in this case.[16] Finally, the federal government has conditioned the receipt of specified federal funds under the Education of All Handicapped Children Act of 1975 on the submission of state plans designed to ensure educational opportunity for handicapped children at no cost to the child's parent or guardian. 20 U.S.C.A. §§ 1401 et seq. (West 1978). Like the Massachusetts statute and the overwhelming majority of other states' statutes, the federal provision permits states to meet their obligation by delegating the education of handicapped students to private institutions. 20 U.S.C.A. § 1413(a)(4)(B) (West 1978). At

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[16] A compendium of statutes appears in the Appendix at 89-91.

least forty-nine states have adopted special education plans pursuant to the federal statute. Note, Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975, 92 Harv. L. Rev. 1103, 1105 (1979).

Moreover, the significance of the rights involved in this case makes it one of public importance meriting review by this Court. This Court has long recognized the importance to this nation of public education. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State"); Brown v. Board of Education, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments"). This Court has also long

recognized the importance of public school students being taught by teachers whose First Amendment rights were protected. See, e.g., Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).[17] Not only do the students benefit directly in being taught by teachers who retain their freedom of speech, see id., but their parents and the public benefit by having persons knowledgeable about school affairs contribute to the public debate thereon. See, e.g., Pickering v. Board of Education, 391 U.S. 563, 571-72 (1968).

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[17] As a group, special needs students, because of their disabilities, probably have the greatest need for teachers who are free to comment on their education and, if necessary, to advocate for them.

The decision below also has important ramifications for the future of special education in Massachusetts. When the Massachusetts state legislature enacted Mass. Gen. Laws Ann. ch. 71B, it sought to "prevent denials of equal education opportunity" to special needs children. Commonwealth v. School Committee of Springfield, Mass. Adv. Sh. [1981] at 513, 417 N.E.2d at 414, quoting St. 1972, ch. 766, § 1. Under the First Circuit's interpretation of federal law, those children who are placed by their school committee in ostensibly private schools do not enjoy the benefit of receiving their public education from teachers who have a constitutional right to comment on issues related to that education. Hence, the education which the state so scrupulously tried to make equal has now been rendered

inherently unequal as a matter of federal law.

To summarize, because of the nature of the rights involved and the possible application of this decision to special education programs in virtually every state in the nation, and because the question presented remains unsettled, there is a substantial need for guidance from this Court as to the circumstances, if any, under which local governments may delegate to private schools their statutory duty to provide special education programs without also delegating their attendant constitutional obligations.

2. To the Extent This Court and Other Federal Courts Have Addressed Related Questions, the Decisions Have Conflicted, in Principle, With the Decision of the Court of Appeals in This Case.

Although no other court of appeals appears to have decided the precise ques-

tion raised here, both the Second and Ninth Circuits have found state action in cases which, in principle, are indistinguishable. Also, the United States District Court for the Southern District of New York very recently denied a motion to dismiss for lack of state action on facts virtually identical to those here.

The Second Circuit case, Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974), was a civil rights suit under 42 U.S.C. § 1983 brought by a parent against, among others, two private child care facilities, for the allegedly unlawful and unconstitutional detention of plaintiff's children. The children had been placed in the private facilities by the City of New York, pursuant to N.Y. Soc. Serv. Law § 395 (McKinney Supp. 1972), which provided that the state was responsible for children in need of

care and protection, and authorized the state, in fulfilling its obligation, to act through authorized private agencies of the type named as defendants in the complaint. The court found state action because the facilities were instrumentalities through which the state was fulfilling its legal obligation to care for the children. As the court explained:

> [T]he statutory scheme expressly contemplates that in performing this public function of caring for children the State may utilize private entities of the sort we have here. This is precisely what the city welfare officials did when they transferred appellant's children to the care of the institutional defendants. But, as the statute makes incontrovertibly clear, it is the State which in effect is providing the care <u>through</u> the private institutions. This exercise of the administrative placing prerogative does not affect in any way the State's ultimate responsibility for the well-being of the children, and, consequently, the public nature of the function being

performed. 499 F.2d at 765 (Emphasis in original; footnote omitted).[18]

Although Perez involved private child care facilities rather than a private school, the statutory scheme under which children were placed in the facilities in Perez was otherwise very similar to the statutory scheme under which students were assigned to the School. Under the reasoning of Perez, any actions of the School directly related to the discharge by the

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[18]Later in its opinion, the court noted that the private institutions would be subject to constitutional requirements only in connection with their discharge of the public function of detaining plaintiff's children, and not with any "'collateral aspect of' the business of operating an institution which cares for children." 499 F.2d at 766, quoting United States v. Wiseman, 445 F.2d 792, 796 (2d Cir.), cert. denied, 404 U.S. 967 (1971). The present case would not require the extension of the state action concept beyond these limits suggested in Perez.

School of its obligation to provide education to those students, including the dismissal of teachers for expressing their views on that education, would be state action. Since Perez and the present case are, in principle, indistinguishable, it is fair to say that there is a conflict between the two circuits on this issue.

The present case is also indistinguishable in principle from, and in conflict with, Ginn v. Mathews, 533 F.2d 477 (9th Cir. 1976). There, the defendant was a private nonprofit corporation which received state and federal funds for the purpose of operating a Project Headstart Program. Such programs were authorized by federal statute and were funded through federal grants "to public or private nonprofit agencies" such as defendant. 533 F.2d at 472 citing 42 U.S.C. § 2809(a).

Plaintiffs alleged that they had been dismissed by defendant in violation of their First, Fifth, and Fourteenth Amendment rights. The district court found no state action and dismissed, but the Ninth Circuit reversed, citing, ironically, an earlier First Circuit decision, McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971).[19]

In the present case, the First Circuit purported to distinguish Mathews on the ground that, in Mathews, "hiring and firing were under the control of a Board of Directors, the composition of which was controlled in part by the regulations." 641 F.2d at 27, n. 23 (App. 23, n. 23). It is not clear to what Board of Directors

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[19] But see Hines v. Cenla Community Action Committee, Inc., 474 F.2d 1052 (5th Cir. 1973), where a divided panel of the Fifth Circuit affirmed a finding of no state action on facts very similar to Mathews.

and to what regulations the First Circuit was referring. Perhaps it was alluding to a federal manual which required that a Headstart Policy Council, consisting in part of parents of Headstart children, be permitted to approve or disapprove the hiring or firing of Headstart staff. 533 F.2d at 480. If so, it is difficult to see why this should distinguish Mathews, because the Headstart parents would have been no more closely tied to the state than the defendant members of the Board of Directors who controlled hiring and firing in the present case. Therefore, it may fairly be said that there is also a conflict between the decisions of the First

and Ninth Circuits on this matter.[20]

The case most nearly on point is an as yet unreported decision of the United States District Court for the Southern District of New York, Ross v. Allen, No. 80 Civ. 3422 (RWS) (S.D.N.Y., filed May 6, 1981), a copy of which is reproduced in the Appendix. Ross involved the New York counterpart of the Massachusetts special education statute, N.Y. Educ. Law §§ 4401 et seq. (McKinney Supp. 1980). Plaintiff had been employed as a psychologist by defendant, a private school whose main function was to educate handicapped children referred to the school by the New

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[20] In fact, in one respect, the argument in favor of state action was considerably weaker in Mathews than in the present case. In Mathews, there does not appear to have been an affirmative obligation on the part of the state or federal government to establish and fund Headstart Programs, whereas, in the present case, local governments were obligated to provide special education.

York City Board of Education. She alleged that she had been unlawfully terminated by the school for exercising her First Amendment rights on behalf of one of the school's students. The school moved to dismiss on the ground that plaintiff's dismissal did not involve state action, but the court denied the motion, on the authority of Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974). The court stated:

> The statutory scheme involved here is, in all relevant respects, indistinguishable from that relied upon by the court in Perez. Under New York Education Law §§ 4401 et seq., the state has the duty to provide for the educational needs of handicapped children. It can fulfill that duty either through operating programs in the public schools or through contracting with private institutions, but it retains responsibility for the provision of educational services regardless of the means by which they are provided. . .
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> . . . Here, as in Perez, it would appear that the state in effect provides the mandated care through the private institution with which it

contracts. Slip Op. at 5 (App. 68-70) (Footnote omitted).[21]

As Perez, Mathews and Ross illustrate, there is a considerable split of authority among lower federal courts as to the extent to which a governmental agency may delegate statutory duties without also delegating attendant constitutional obligations. In at least two respects, there is also a conflict in principle between opinions of this Court and the decision of the First Circuit. The first conflict concerns the First Circuit's reluctance to find state action in a dele-

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[21]At this point, in a footnote, the court purported to distinguish the present case on the ground that it was not clear from the opinion whether, under the Massachusetts statute, the state continued to be responsible for the child's education following the placement. However, as noted supra, at 9-10, the state continues to have such oversight responsibilities under Massachusetts law. For this reason, Ross is not distinguishable.

gation case without a preliminary finding that the delegation was a subterfuge to evade constitutional requirements. See 641 F.2d at 23-24 (App. 16-17). The second conflict concerns the question of standing.

On several occasions, this Court has emphasized that, when fundamental rights are infringed, effect is at least as important as purpose. For example, in Norwood v. Harrison, 413 U.S. 455 (1973), the Court struck down a program under which the State of Mississippi lent textbooks to private schools, including segregated schools. The district court had found no discriminatory motive, although the effect of the program was to foster discrimination. This Court did not disturb those findings, but it held that a proper motive could not compensate for a

discriminatory effect:

> We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect . . . ." 413 U.S. at 466-67 (Citation omitted).

The Court went on to explain that even though the private schools had associational rights, including the right to practice private discrimination, those rights were outweighed by the discriminatory effect of the program. 413 U.S. at 469-70.

Norwood suggests an appropriate framework for analysis of the present case. First, the court of appeals should have attempted to identify the competing interests at stake. Then it should have

attempted to weigh those interests in the context of the facts of the case. Finally, it should have considered the probable way its decision would affect those competing interests.

Had the First Circuit undertaken this type of analysis, it would have observed that the School, like other private individuals and institutions, has certain privacy and associational rights, including the right to hire and fire employees.[22] On the other hand, because public school students are assigned to the School, competing First Amendment interests are at stake. Assigned students do not freely choose to become associated with the School. Yet, they have as much

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[22]The state action requirement is itself one of the strongest safeguards against federal encroachment on privacy and associational rights.

interest as other public school students in receiving their education from teachers who need not fear for their jobs if they speak out on matters of educational policy. Parents of such students also have a strong interest in being able to discuss educational programs with teachers who can be candid in the expression of their opinions. Members of the community, who fund special education programs through their tax dollars, also have an interest in hearing the opinions of teachers as to how wisely those dollars are being expended. All of these interests should have been identified as worthy of protection.

The second step in the analysis should have been for the court to weigh those competing interests. In doing so, it would have been appropriate for the

court to consider the fact that teachers are uniquely qualified to contribute to public and private debate concerning educational programs and policies, by virtue of their training, their experience, and, perhaps most importantly, their proximity to their students and their familiarity with their students' needs. It would also have been appropriate to consider the fact that the speech for which petitioners were dismissed included public speech (in a town newspaper) and private speech (to the Board of Directors) which was directly related to the performance of the public function which the state had delegated to the School. Conversely, the court should have discounted the School's claim to privacy and associational rights in recognition of the fact that the School willingly accepted

the placement by the state of all fifty of the School's students, as well as public funds appropriated by the state to pay for the education of those fifty students.

Finally, after weighing the competing interests, the court should have considered the likely effect its decisions would have on those interests. Had it done so, it would have been clear that a rejection of petitioners' state action claim would have the effect of making more teachers reluctant to participate in public or private debate concerning special education, to the detriment of students, parents, concerned citizens and the values embodied in the First Amendment. On the other hand, since the School's entire student body had been placed there by the

state, at the School's request and at public expense, and with the School's wholehearted approval, it would also have been apparent that extending limited First Amendment protection to teachers under the circumstances of this case would not seriously impair the School's privacy and associational rights. Therefore, under this type of analysis, which would have been more in keeping with prior decisions of this Court, the court of appeals should not have dismissed petitioners' claims.

The decision of the court of appeals also conflicts, in principle, with decisions of this Court to the extent it suggests that, because petitioners were not "intended beneficiaries of the service for which the state has contracted with the school," 641 F.2d at 26 (App. 23), they lacked standing to challenge their

dismissals on First Amendment grounds. This narrow view of petitioners' standing overlooks cases such as Marsh v. Alabama, 326 U.S. 501 (1946), which emphasize that the right of free speech should be preserved not just for the benefit of the speaker but for the benefit of society as a whole. For reasons previously discussed, teachers are uniquely qualified to participate with students, parents, school administrators and the community at large in debates concerning educational policy and programs. Indeed, as professionals in the field of education, they would properly feel an obligation to do so. Yet, if they know they may lose their jobs for expressing their opinions as freely as their counterparts in public schools, they will be reluctant to participate in those debates. Thus, the

critical question should not have been whether petitioners were the "intended beneficiaries" of the state's contract with the School, but rather whether the intended beneficiaries of the First Amendment, namely the students, their parents and the community, would have been better served by recognizing the right of teachers to speak out as petitioners did here.

CONCLUSION

As this Court has recognized, the question presented in this case is an unsettled one. It is also a question of considerable importance in federal law. The court of appeals failed to recognize the novelty of the question herein, failed to apply a suitable analysis, and reached a result that conflicts, in principle, with decisions of other courts of appeal

and with a decision in a virtually identical case by a federal district court. For all these reasons, and because this Court's guidance is needed to assist lower federal courts in their historic task of protecting core First Amendment values in the public education of the nation's school children, this petition for writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 80-1328

SHEILA RENDELL-BAKER,

PLAINTIFF, APPELLANT,

v.

SANDRA KOHN, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

No. 80-1451

WAYNE KLUG, ET AL.,

PLAINTIFFS, APPELLEES,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. A. DAVID MAZZONE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Robert J. Doyle, with whom *Doyle, Playter, Novick & Berkin* was on brief, for Sheila Rendell-Baker.

Matthew H. Feinberg, with whom *Mary Catherine Leonard*, and *Kassler, Feinberg & Feuer* were on brief, for the New Perspectives School, Inc., et al.

Betty E. Waxman, Assistant Attorney General, Government Bureau, Department of the Attorney General, with whom *Francis X. Bellotti*, Attorney General, was on brief, for Francis X. Bellotti, et al.

Kurt M. Pressman, with whom *Goldstein & Pressman* was on brief, for Wayne Klug, et al.

February 12, 1981

CAMPBELL, *Circuit Judge*. These two consolidated appeals from differing judgments in the district court involve claims brought under 42 U.S.C. § 1983 by former staff members of the New Perspectives School, Inc. Plaintiffs contend they were discharged because of exercise of their first amendment rights and without due process. The only question now before us is whether, in discharging plaintiffs, the defendants acted "under color of any statute, ordinance, regulation, custom or usage, of any state."

I.

The decisions under review both occurred without the taking of any evidence. In *Rendell-Baker*, summary judgment for defendants was entered on the basis of the pleadings, exhibits appended to the complaint, answers to interrogatories, and affidavits submitted in support of and in opposition to defendants' motion for summary judgment. These documents comprise the record in that case. In *Klug*, the court denied a motion to dismiss for failure to state a claim on which relief may be granted, taking the facts alleged in the complaint and supported by the appended exhibits in the light most favorable to the plaintiffs. Strictly speaking, the record in *Klug* consists only of the complaint, and that case presents only the question whether the district court erred in holding that it did not appear "beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Walker Process Equipment* v. *Food Machinery*, 382 U.S. 172 (1965). Appellees in *Klug* have, however, invited us to consider the record in *Rendell-Baker* along with their complaint. Given this invitation, and the fact that the additional information in the *Rendell-Baker* proceeding tends, if anything, to support

rather than to weaken their claim of state action, we feel free to draw on the records of both cases in describing the school and its relationship to the state, as we ultimately rule against plaintiffs on this critical issue.

a. *The New Perspectives School*

The New Perspectives School is a small, non-profit school which offers a high school program to students who have had difficulty completing an ordinary high school. The school is organized as a non-profit corporation under the laws of Massachusetts and is located on privately owned property in the Town of Brookline, Massachusetts. The school is operated by a Board of Directors, no member of which is a government official or is chosen by any government official or governmental body. The record is silent as to the history of the school; we do not know anything about its age, founding or original sources of funding.[1] The school serves approximately 50 students, all on a tuition-free basis. Virtually all the students have drug, alcohol, or behavioral problems, or have other special needs, and most are referred to the school by the Town of Brookline or the City of Boston under Chapter 766 of the Massachusetts Acts of 1972, or by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health.[2]

[1] At oral argument, counsel for the school indicated that the school was set up initially with private funds but has become increasingly dependent upon public funds as they have become available.

[2] Chapter 766, Mass. G.L. c. 71B, § 3, provides that each school committee is required to identify students with special needs and to propose and arrange for an educational program suitable for each such child. Parents may reject the school committee's placement and elect instead a regular school program, unless it is determined that the child's placement in a regular program will seriously endanger the child's health or safety or substantially disrupt the program. If, however, the parents reject the school committee's placement and choose instead another special placement, they must submit the matter to the state advisory commission on special education, unless, of course, they are willing to themselves bear the ex-

As of July 1978, when the school answered Ms. Rendell-Baker's interrogatories, all 50 students were referred there by one or more of these governmental bodies. We were informed at oral argument that students could also come to the school through private referral sources or on their own initiative. According to the complaint in *Klug*, the school is authorized to issue high school diplomas certified by the Brookline School Committee.

New Perspectives School has received funds, in varying amounts over the years of its operation, from numerous governmental agencies. In answer to an interrogatory the school indicated the following funding sources: Chapter 766;[3] Town of Brookline; Massachusetts Department of Mental Health; Department of Youth Services; Massachusetts Division of Family and Children's Services; Office for Children; Law Enforcement Assistance Administration (LEAA);[4] Private Contributors and Foundations. For the fiscal year 1975-76, funds from the various governmental sources accounted for approximately 91 percent of the school's budget, while private donations accounted for 9 percent. For 1976-77, the figures were approximately 99 percent and 1 percent.[5] We have no figures

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pense of their chosen program. The district court's memorandum in case No. 80-1451 indicates that the Town of Brookline does not itself maintain facilities for special needs students, but we have found nothing in the record to support that statement.

[3] We are not aware of any funding agency called "Chapter 766." Our reading of that statute, Mass. G.L. c. 71B, §§ 3, 4, suggests that responsibility for the costs of special education rests on the school committees of each city, town and region. We therefore interpret the school's reference to Chapter 766 as a funding source as referring to funds received from school committees as payment for services to students placed with the school in fulfillment of the requirements of that statute.

[4] We interpret this reference to LEAA as indicating funds granted to the school by the Massachusetts Committee on Criminal Justice, an organization which disburses federal funds received by the state from LEAA.

[5] These percentages are approximate, based on rounded off

for other years, but the school does not suggest that these two years were unrepresentative.

In order to be eligible for these forms of public funding, the school has been required to conform to various governmental regulations. To receive placements, and funding, under Chapter 766, a school must be approved by the Massachusetts Department of Education.[8] The Department has issued a 33-page set of "Guidelines for the Approval of the Day Educational Component in Private Schools under Chapter 766." These guidelines relate to a wide variety of aspects of a school's operation, including financial recordkeeping, student discipline, staff training, use of volunteers, medical examinations for students, parent involvement, health care, subjects of instruction, teacher-student ratio, qualifications of teachers, evaluation of teachers, student records, confidentiality of records, transportation, insurance, food and nutrition, food preparation, toileting procedures, physical space and facilities, and classroom equipment. The guidelines also require that the school carry out each element of the educational plan specified for each child by the local school committee under Mass. G.L. c. 71B, § 3. On personnel policies the guidelines are less specific than they are on some other issues; they require only that the school maintain written job descriptions and a written policy on criteria and procedures for

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figures given in the school's answers to interrogatories, as follows: for fiscal year 1975-76, $90,000 from government sources and $9,000 from private sources; for 1976-77, $161,000 from government sources and $2,000 from private sources.

[8] Mass. G.L. c. 71B, § 4 provides in part:

> "The school committee of any city, town or school district may, to meet its obligations under section three, with the approval of the department enter into an agreement with any other school committee to jointly provide special education or, subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, may enter into an agreement with any public or private school, agency, or institution to provide the necessary special education within the city, town or school district."

hiring, suspension and dismissal, procedures for handling staff complaints, and provisions for vacations and other benefits.

The school is also bound by its agreement with the Massachusetts Department of Mental Health, Drug Rehabilitation Division. Under that contract, the school, which is designated as "the Contractor," is required to provide counseling, educational and prevocational services for drug dependent or drug abusing persons and to give priority to clients referred by the Division. The contract provides for reimbursement of expenses specified in an attached schedule. The contractor is required to abide by certain general requirements regarding such subjects as equal employment and equal service, respect for the human rights of the persons served (*i.e.*, with regard to research on human subjects), and avoidance of conflicts of interest. The contract makes no mention of personnel policies or rights of staff members.

The school's contract with the City of Boston subjects it to additional regulation. That contract states as its purpose compliance with the City's obligations under Chapter 71B through "the furnishing of special educational services by private facilities." Under the contract, the school must carry out the educational plan devised by the Boston School Committee for each Boston student placed with the school. The school must submit periodic reports on its services, and it is subject to inspection at any time during normal business hours. Pupil records must be kept confidential, and the school's employees are subject to the state conflict of interest law, Mass. G.L. c.268A. Except for this latter provision, the school "shall have no capacity to ... incur any liability on the part of the city. The Facility, its agents or employees shall not have the status or pension rights of a city employee ...." The contract also provides that the school, and not the City, shall bear liability for any injuries to students or employees and for any claims "arising from any act or omission of the Facility, its agents or employees ...." The school's answers to interrogatories in-

dicated that it is subject to additional regulations by the Department of Youth Services and by the Brookline School Committee, but the record does not include details of these regulations.

In May 1975, the school, through the Town of Brookline,[7] submitted a grant proposal to the Massachusetts Committee on Criminal Justice, a state agency which distributes funds received from the federal Law Enforcement Assistance Administration. The proposal was for a vocational program to provide students and recent graduates with vocational counseling, training in job skills, and placement in jobs. The grant application includes a statement that the applicant would comply with a set of general conditions relating to the use of the funds and to the sources of other funds for the project. Only one of these conditions makes any mention of staff or personnel; that one provides that "The staff and/or consultant competencies and resources necessary to assure successful conduct of the project will be provided. Prior approval of the Committee is required for staff hiring and salary increases of any kind, and for engaging consultants in accordance with OMB Circular A-102 and Federal Procurement Manual M 1700.6."[8] The proposal describes in detail the vocational

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[7] The grant application, submitted as an exhibit by Ms. Rendell-Baker, lists the applicant as the Town of Brookline, with the New Perspectives School listed as the implementing agency. The grant was awarded by the Committee to the Town for the school. Brookline provided 5 percent matching funds, while the state provided an additional 5 percent. In a "Field Monitoring Inspection" report dated February 25, 1977, a grant manager of the Committee reported that "Although the grant is carried out by New Perspectives School, Inc., the employees of the grant are considered Town employees, and therefore no contract exists between Brookline and New Perspectives." At oral argument in this court, however, counsel for Ms. Rendell-Baker indicated in response to a question as to why the Town was not named as a defendant, that she was not aware of the involvement of the Town of Brookline until discovery for this action was conducted on the state defendants.

[8] Defendant Highgas states, in his affidavit in support of defendants' motion for summary judgment in *Rendell-Baker*, that the

program, which apparently was already in operation at the time of the grant application, and provides a job description for the vocational counselor. The grant was approved for the year 1976 and renewed for 1977.

b. *Discharge of Ms. Rendell-Baker*

Sheila Rendell-Baker, who had been serving as a volunteer, was hired as the vocational counselor funded by the grant. Ms. Rendell-Baker held that position until she was discharged on January 3, 1977. Her account of the discharge, as alleged in her complaint, is as follows: In December 1976, a controversy arose between a group of students and the school's director, Ms. Sandra H. Kohn, related to the responsibilities of a student-staff council in the hiring of staff. The students presented a petition at a meeting of the Board of Directors. Ms. Rendell-Baker voiced support for their position, and Ms. Kohn voiced opposition. On January 3, 1977, without prior notice, Ms. Kohn requested that Ms. Rendell-Baker resign. When Ms. Rendell-Baker refused to resign, Ms. Kohn discharged her, without citing any specific cause or allowing her any opportunity to respond to allegations against her.

After her discharge, Ms. Rendell-Baker, through her attorney, contacted the school and demanded either reinstatement with back pay or a hearing, on the ground that she had been discharged for exercise of her first amendment rights and without due process. After an exchange of letters, which Ms.

Committee's prior approval of hiring consisted of reviewing resumes submitted by the school to ensure that applicants' qualifications met the requirements established by the school in its proposal, and that the Committee did not interview applicants or exercise any subjective judgment in the hiring process. In this regard, defendants cite LEAA Circular A-87, which provides in part:

> "Each grantee or contractor organization, in recognition of its own unique combination of staff facilities and experience, will have the primary responsibility for employing whatever form or organization and management techniques may be necessary to assure proper and efficient administration."

Rendell-Baker submitted as affidavits, the school agreed to apply retroactively a newly adopted personnel policy, which provided for involuntary termination for specified causes, subject to review by a three-member grievance committee. The school's president appointed a grievance committee, but Ms. Rendell-Baker objected to its composition and demanded a formal hearing before a mutually agreeable committee. The record does not reflect any further action by the school on the matter.

On December 13, 1976, the school informed the Committee on Criminal Justice by letter that Ms. Rendell-Baker had been terminated, effective January 14, 1977, and that the school had chosen a candidate to fill the position. On January 17, Ms. Rendell-Baker's attorney sent to the Committee a copy of his letter to the school protesting her discharge. A representative of the Committee informed the school, in a letter dated February 23, that "While the Committee makes no comment on the matter, you are advised that no candidate to fill the subject position will be approved until such time as you provide me with written justification of your action, specifically citing any rules and regulations under which the action was taken." The school responded with an account of its actions,[9] and the Committee answered, on March 29, indicating that it was satisfied.[10] The Committee then informed Ms. Rendell-

[9] The school's response occurred in two separate letters. The Committee answered the first with the following statement: "[W]hile you explain your actions in great detail, you fail to shed any light on exactly how the decision was reached, whether or not you adhered to any established criteria or procedure, and what kind of notice was given to Ms. Rendell-Baker." The school's second letter apparently satisfied the Committee.

[10] This letter from the Committee included the following:

"You are advised, however, that if you move to fill the vacant position and you choose to expend funds, you will not have LEAA money available to meet a successful claim for back pay by Ms. Rendell-Baker. Payment of such a claim would be allowable to the extent that the salary remains unexpended.

Baker's attorney, in response to his request that it hold a hearing, that:

> "The Committee is not in a position to demand that a hearing be held or to impose sanctions against New Perspectives School, Inc. for its failure to hold such a hearing. The Committee can, however, hold Ms. Kohn to her assurances before approving a new hire to fill Ms. Rendell-Baker's position."[11]

Ms. Rendell-Baker brought this suit in July 1977.[12] Upon completion of discovery, defendants Bellotti and Highgas moved for summary judgment on the ground that Ms. Rendell-Baker's dismissal had not occurred "under color of state law." Alternatively, they sought dismissal of the action as to themselves. Ms. Rendell-Baker submitted a memorandum opposing the motion, but she neither contested nor conceded that no material issues of fact remained on the question of state action. By an order dated April 16, 1980, the district court granted both motions.[13] Ms. Rendell-Baker brought appeal No. 80-1328.

> LEAA funds may not be used to pay any other form of damages or any fines or penalties that might be levied against the New Perspectives School, Inc."

[11] The reference to "assurances" appears to indicate Ms. Kohn's statement, in her letter to the Committee, that the school's personnel policy would be applied retroactively so that the matter could be heard by a grievance committee.

[12] Named as defendants were the school, the members of its Board of Directors, including Ms. Kohn, both individually and in their official capacities, Francis X. Bellotti as chairman of the Massachusetts Committee on Criminal Justice, Robert J. Kane, former Executive Director of the Committee, and certain federal officials in their capacities as officials of LEAA. William Highgas, current executive director of the Committee, was later substituted for his predecessor, and the federal defendants were dismissed by order of the district court on April 12, 1980.

[13] The order terminating the action is phrased as a dismissal, although it occurred in response to a motion for summary judgment.

c. *Discharge of the plaintiffs in case No. 80-1451*

Case No. 80-1451 arises out of a later series of disturbances at the school. According to the complaint, during the 1977-78 school year, the school experienced a considerable amount of dissension among both faculty and students. Some members of the faculty considered the school's difficulties attributable to inadequate management by the Director, Sandra Kohn; in May 1978 the plaintiffs wrote a letter to the school's Board of Directors urging it to discharge Ms. Kohn. The Board responded by affirming its confidence in Ms. Kohn. On June 5, 1978, students of the school picketed the home of James Schlesinger, president of the school's Board of Directors, to express opposition to Ms. Kohn's directorship. Ms. Kohn directed the staff to tell the students that further picketing would cause their suspension. The staff did so, but the plaintiffs later informed her that an attorney had advised them that the prohibition on student picketing was unconstitutional. Sometime during this period, the *Brookline Chronicle* carried an article about the disturbances at the school. On June 15, 1978, a letter to the editor appeared in the *Chronicle* in which the plaintiffs refuted some statements in that article and stated their belief that the prohibition on picketing was unconstitutional. That same day, the plaintiffs informed Schlesinger that they were forming a labor organization. On June 16, Ms. Kohn discharged four of the plaintiffs. A fifth, Dawn Fonseca, had previously resigned but later offered to withdraw her resignation. Mr. Schlesinger declined the offer and accepted her resignation on June 9.

The five plaintiffs brought this suit in December 1978, naming as defendants the New Perspectives School and each of its directors, both individually and in their official capacity. The school moved to dismiss on the ground that it had not acted "under color of state law." The district court denied the motion but certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). We granted leave to appeal and consolidated the two cases.

II.

Section 1983 of 42 U.S.C. provides for legal liability in favor of an injured party against,

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

In the Civil Rights Cases, 109 U.S. 3, 11 (1883), the Supreme Court declared, "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the [fourteenth] amendment." The Court reiterated this principle in *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1947), when it stated that "the action prohibited . . . is only such action as may fairly be said to be that of the states. [The fourteenth] amendment erects no shield against merely private conduct, however discriminatory or wrongful." The question before us, therefore, is whether the action of the New Perspectives School in discharging the plaintiffs "may fairly be said to be that of the State."

Plaintiffs in the two cases argue, citing *Burton* v. *Wilmington Parking Authority*, 365 U.S. 716 (1961), that the New Perspectives School is "sufficiently intertwined with the state to imbue its actions with the color of state law" — that is, that the school is in reality a state institution, so that any action by it is action of the state. Ms. Rendell-Baker makes the alternative argument that, because of the action of the Committee on Criminal Justice in creating and funding her position and in approving her discharge, the school's action in regard to her is attributable to the state even though other action by the school would not be.

Defendants, citing *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Moose Lodge No. 107* v. *Irvis*, 407 U.S.

163 (1972), argue that action of the school may be considered state action only if the state participated directly in the particular action which is under attack, no matter how close the overall relationship between the school and the state. Defendants point out that the decision to discharge the plaintiffs was made by privately appointed officials of the school, not by any state officials, and that no state agency had undertaken to regulate or control the school's policies or procedures for hiring and firing staff. They conclude, therefore, that plaintiffs' discharges were not the action of the state.

In *Burton*, the Court found state action in the discriminatory service policy of a privately operated restaurant located in a publicly owned parking garage. There was no question that the restaurant controlled its own affairs and had reached on its own the decision to refuse service to blacks. But the Court found that "The State has so far insinuated itself into a position of interdependence with Eagle [Coffee Shop] that it must be recognized as a joint participant in the challenged activity." *Id.*, at 725. The Court emphasized the restaurant's use of "an integral part" of a publicly owned and maintained building which was by statute dedicated to "public uses," and the mutual benefits conferred upon both the restaurant and the parking authority by their association. The Court noted particularly that, to the extent that the restaurant's discriminatory service policy contributed to its profits, that policy contributed also to "the financial success of a government agency." *Id.*, at 724. The Court warned, however, that it did not intend "to fashion and apply a precise formula for recognition of state responsibility," and that "only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." *Id.*, at 722.

In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), the Court found no state action in the discriminatory service policy of a private club which held a state liquor license, de-

spite the state regulation that went with the grant of a liquor license. The Court expressed no disapproval of *Burton*, but rather distinguished that case on the ground that the Moose Lodge was not located on public property and did not have the sort of "symbiotic relationship" with the state that the Eagle Coffee Shop had had. *Id.*, at 175. Finding no close overall relationship, as in *Burton*, the Court considered whether the regulations of the State Liquor Control Board in any way encouraged racial discrimination, and found that they did not.

The Supreme Court's most recent pronouncements occur in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). There the Court found no state action in the discontinuation of service to a customer, without a hearing, by a privately owned and operated, but heavily regulated, utility company. The Court defined the inquiry as "whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the state itself." *Id.*, at 351. To answer this question, the court considered whether the state had directly encouraged or approved the particular practice under challenge, and found that it had not. But the Court did not stop there. It again distinguished *Burton*, without expressing any disapproval of that case, finding that extensive regulation and performance of a public service "affected with a public interest" were not enough to show the "symbiotic relationship" found in that case.[14]

The plaintiffs in these cases argue that *Burton* and *Jackson* establish two distinct tests, with the *Jackson* test applicable where the *Burton* test fails, and that the *Burton* test is satisfied here. Defendants respond that *Jackson*, together with *Moose Lodge*, has implicitly overruled *Burton*, and has established as determinative of state action a test of the direct connection between the state and the challenged action. A panel of this

[14] The *Jackson* Court did not accept the assertion that the utility held a state-granted monopoly. *See* p. 351, n.8.

court indicated in *Downs* v. *Sawtelle*, 574 F.2d 1, 8-9 (1978) (finding state action in an involuntary sterilization at a community hospital run by a town-appointed Board of Directors), that it did not believe that *Burton* has been overruled. It stated, at 9:

> "The essence of *Burton* which survives *Jackson* is that the relationship between the state and the private institution may be so intertwined that the state will be held responsible for conduct with which it had no direct connection."

See also Holodnak v. *Avco Corp.*, 514 F.2d 285 (2d Cir. 1975) (applying *Burton*, after *Jackson*, to find the first amendment applicable to an employee of a company doing defense-related work on United States government property).

The more difficult problem, of course, is to decide what constitutes such an "intertwined" relationship. Although we do not presume to establish the "precise formula" which the Supreme Court has declined to fix, we think it possible to identify certain factors which have tended to weigh heavily in findings of such a relationship. In *Burton* itself, the strongest factor seemed to be the use of public property, and particularly its use in a way that excluded a segment of the public. We relied heavily on the same factor in *Fortin* v. *Darlington Little League*, 514 F.2d 344 (1975) (state action found in sex discrimination by Little League, all of whose activities were carried out on town field specially laid out for Little League use). *See also Holodnak* v. *Avco Corp.*, 514 F.2d 285; *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1973) (city enjoined from permitting exclusive use of public parks by segregated private groups, where the city had previously been ordered to desegregate the public parks).

Downs v. *Sawtelle*, 574 F.2d 1, involved public property only in the sense that the Town had a right to receive the hospital's profits and its assets upon dissolution. The more significant factor there, however, was that the Town Board of Selectmen appointed the hospital's entire Board of Directors.

That factor made the case an example of a situation where "state involvement with a private entity . . . is 'so dominant as to afford a basis for a contention that the state is merely utilizing private trustees to administer a state activity.' " *Braden* v. *University of Pittsburgh*, 552 F.2d 948, 974 (3d Cir. 1977), Garth, J., concurring, quoting *Powe* v. *Miles*, 407 F.2d 73, 81 (2d Cir. 1968). In such a situation, every decision made by the nominally private entity may fairly be attributed to the state, since the decision-makers derive their authority from the state.

In *Powe* v. *Miles*, *supra*, and *Braden* v. *University of Pittsburgh*, *supra*, the courts relied on expressions of intent by the states to treat a disputed entity as arms of the state.[15] In each of those cases, the state legislature had passed a statute indicating the nature of the state's relationship to the university involved. In the *Pittsburgh* case, the statute specifically declared that one university to be state-related, and it changed the school's name to indicate the state's role. In *Powe* v. *Miles*, New York statutes designated the state contract colleges as integral parts of the state university, and referred to the private university which housed the contract college in question as "the representative of the state university trustees." *Id.*, at 83. These cases indicate that where a state expresses its own understanding that an institution is under its control and subject to its constitutional obligations, these expressions may be given great weight.

Finally, should a public institution be placed in private hands with the actual purpose of evading constitutional requirements, the courts may look beyond the formal structure of the institution to find other indicia of state involvement. *See, e.g.*, *Evans* v. *Newton*, 382 U.S. 296 (1966) (appointment of private trustees to manage a previously public park, the use of which was limited to whites by the will of the donor, found

[15] Both these cases also involved some use of public property and some state representation on the schools' boards of directors.

insufficient to divest the park of its public character); *Gilmore* v. *City of Montgomery*, 417 U.S. 556.

III.

We have carefully considered the facts of this case, and although we note a considerable degree of cooperation between the state and the school, we are not persuaded that any of the particular factors we have discussed applies to the New Perspectives School, or that any other factors justify a finding that the challenged action occurred "under color of state law." Plaintiffs concede that the school does not conduct its activities on public property or within public facilities, as in *Burton* and *Fortin*, *supra*, and there is no suggestion of a subterfuge to avoid constitutional obligations through creation of a sham private entity as in *Evans* and *Gilmore*. To be sure, we are told the Town of Brookline permits the school to issue high school diplomas certified by its school committee. Arguably this amounts to an expression of intent by the Town comparable to that of the governmental bodies in *Braden* and *Powe*, to treat the school as a public institution.[16] The state's other pronouncements, however, particularly the references to private schools in Mass. G.L. c.71B, § 4, and in the Department of Education's guidelines, and the references to the school as a contractor in the Department of Mental Health Agreement and the City of Boston contract, all indicate that the state does not regard the school as a public institution. *See also* note 9, *supra*, regarding the LEAA policy, which is binding on the state's Committee on Criminal Justice. These indications that the state regards the school as private outweigh any contrary inference from Brookline's certification of the school's diplomas.

[16] The record is not clear whether the diplomas issued are the same as those received by graduates of Brookline High School, or whether Brookline merely certifies in some manner the diplomas issued to Brookline students placed under Chapter 766 in all private schools.

Plaintiffs would have us focus on the state's purported dominance in the affairs of the school, to bring the case within our holding in *Downs* v. *Sawtelle*. They rely particularly on four aspects of the relationship between the state and the school: (1) almost complete state funding; (2) extensive regulation; (3) the school's performance of the "public function" of education, particularly special education required of local communities by state law; and (4) mutual benefits which the school and the state derive from their relationship.

The school's funds do, in fact, derive almost completely from governmental sources.[17] This, in our view, is the strongest factor indicating state action. We have, as have other courts, indicated on past occasions that lesser contributions of state funding are not enough to demonstrate state action in all aspects of the operations of an institution. *Cannon* v. *University of Chicago*, 559 F.2d 1063 (7th Cir. 1976) (undetermined amount of state funding of medical school did not show state action in the school's admissions policies); *Berrios* v. *Inter-American University*, 535 F.2d 1330 (1st Cir. 1976) (Puerto Rico University's suspension of students was not state action, despite an undetermined amount of public funding and some regulation by the Commonwealth's accrediting body). *See also McQueen* v. *Drucker*, 438 F.2d 781, 784 (1st Cir. 1971) ("Mere receipt of financial subsidy and subjection to some regulation are the conditions of much of our societal life.") This school's virtual dependence on state financial support goes well beyond anything we have considered before. Since

[17] Defendants argue that we should not count in this calculation funds originating with the federal government. Since the amount of those funds is too small to affect significantly the school's overall dependence on state funding, this case does not turn on the effect of federal funds. We note, however, that the federal funds were funneled through a state agency which appears to have considerable discretion in making grant awards. The exercise of such discretion is doubtless a factor to be weighed in favor of state action, even if the funds themselves are federal in origin.

state funds support every aspect of the school's operation, everything the school does, it can be argued, is made possible by the state. And the state could, if it chose to do so, veto any action of the school it found objectionable by threatening to withdraw its financial support. But the school's dependence on state funds, in itself, demonstrates only that the state has the potential to control the school's operations, not that it actually does so. As a practical matter, the state has the same latent power in relation to any contractor whose primary customer is the state.[18] Indeed the state's power to control any nominally private institution is limited only by the constitutional boundaries of the police power, even where the state does not provide funding. In practice, of course, the state's exercise of its power to control an institution is likely to be greater where it assumes the burden of financial support; for that reason, state funding may be significant evidence of state control. But to find that an otherwise privately operated institution is so dominated by the state that all its actions occur "under color of state law," we must find that the state actually does control the institution, not just that it could do so. In the case of a non-profit organization, the directors' fiduciary duty is to further the causes for which the entity was chartered, regardless of the sources of its funding. For example, a school for the deaf or the blind, managed by an all-private board, does not surrender its rights to pursue independent policies merely because the students are on state-funded scholarships. Even near-complete governmental funding does not turn a private charitable and educational institution into a public entity so long as the private institution remains free, in fact, to control its own affairs.

[18] There are, for example, a considerable number of businesses, such as manufacturers of defense-related equipment, and some research and consulting firms whose clientele consists mainly or entirely of governmental agencies.

Plaintiffs would have us infer state domination from the regulations to which the school is subject. The school is regulated by a number of state and local agencies, and some of these regulations are very detailed. But we are not persuaded that the school's "freedom of decision-making has . . . been circumscribed substantially more than that generally accorded an independent contractor." *McQueen* v. *Drucker*, 438 F.2d at 784-85. The degree of state regulation here is not greater than that exercised over the utility in *Jackson* v. *Metropolitan Edison*, 419 U.S. 345. Each of the various kinds of regulations to which the school is subject would apply as well to a private institution which contracted with the state to educate one student or to conduct one small program in return for a small amount of funds. The school's contractual obligations to the Department of Mental Health and to the Committee on Criminal Justice are similar to the obligations undertaken by any grantee of government funds; they resemble also the obligation that a grantee of funds from a private foundation might incur. The details are provided by the grantee itself in its grant application; and the general conditions are just that — they impose few constraints on the decision-making power of the grantee's management. The guidelines issued by the Department of Education apply to any school at which a locality seeks to place even a single child under chapter 766; the Department appears to contemplate placement of some children in schools whose other students are all privately funded. The Department's guidelines are particularly detailed as they relate to the services to be provided to students, just as any contract for services spells out in detail the services to be performed. But aspects of the school's operation which do not relate directly to services to students are left to the discretion of the school's privately appointed management, just as other government contractors are left free to manage their own affairs so long as they provide the services for which they have contracted. For purposes of this case, it is particularly impor-

tant that none of the state agencies involved has undertaken to regulate the school's personnel policies, except to require that its policies be set forth in writing. The content of the school's personnel policies, including criteria and procedures for hiring and firing, has been left to the discretion of the school's management.[19]

Plaintiffs argue that the school performs a public function.[20] They point out that education at the primary and secondary levels, in contrast to higher education, has most often been a public function in this country. *Compare Krohn* v. *Harvard Law School*, 552 F.2d 21 (1st Cir. 1977) (no state action in Harvard Law School admissions policies, despite public importance of legal education); *Lamb* v. *Rantoul*, 561 F.2d 409 (1st Cir. 1977) (no state action in denial of tenure to a professor at the Rhode Island School of Design, a college-level art school); *Berrios* v. *Inter-American University*, 535 F.2d 1330. *But see Weise* v. *Syracuse University*, 522 F.2d 397 (2d Cir. 1975) (state action found in discharge of instructor at Syracuse University, a nominally private school receiving some public funds). Plaintiffs further insist that Chapter 766 reflects the state's view that special education is a public responsibility, or at least that the state considers it advisable to assume that responsibility. But the fact remains that there is a strong tra-

[19] Defendants aver in an uncontested affidavit that the Committee on Criminal Justice reviewed hiring decisions only to ensure that the chosen candidate met the school's own criteria, and that the Committee exercised no subjective judgment in hiring. *See* note 9, *supra*. In any event, the Committee's grant funded only one position at the school.

[20] The "public function" concept seems to derive from *Marsh* v. *Alabama*, 326 U.S. 501 (1946), in which the Supreme Court held that first amendment rights of one distributing religious literature applied to the privately owned streets of a company town. The Court emphasized that the company had treated the streets as public and had not restricted access to them. Its holding therefore may imply a kind of public easement based on estoppel.

dition of private elementary and secondary education in this country, and that special education is clearly not an *exclusively* public function. Indeed, it is only recently that public school systems have assumed any responsibility for children with special needs; until a few years ago such children were routinely excluded from public schools. The fact that the state has chosen to perform a service, or to require its political subdivisions to do so, does not make that service an inherently public function.

The "public function" concept is strongest, moreover, when asserted by those for whose benefit the state has undertaken to perform a service, or when the state has lent its coercive powers to a private party. In this situation, for example, those students of the New Perspectives School who were placed there by their local school committee, particularly those who are compelled to attend under the state's compulsory education laws, would have a stronger argument than do plaintiffs that the school's action *towards them* is taken "under color of" state law, since the school derives its authority over them from the state. *See, e.g., McQueen* v. *Drucker*, 438 F.2d 781, in which we found state action in the eviction of tenants by the private owner of a subsidized housing complex.[21] The plain-

[21] These plaintiffs and other private school teachers are, of course, fully protected against discriminatory treatment by Title VII of the Civil Rights Act of 1964, as well as by state employment discrimination laws. Our ruling therefore in no sense licenses discriminatory policies. Compare *Weise* v. *Syracuse University*, 522 F.2d at 405 (lesser state action standard for claims of discrimination than for due process claims because of "peculiar offensiveness" of excluding some citizens from benefits for which all are taxed); *Jackson* v. *Statler Foundation*, 496 F.2d 623, 635 (2d Cir. 1974) ("conduct which is part private and part governmental must be more strictly scrutinized when claims of racial discrimination are made"); *Wahba* v. *New York University*, 492 F.2d 96, 100 (2d Cir. 1974) (state action determinaton depends in part on which provision of the Bill of Rights is alleged to have been violated).

tiffs in this suit, however, are not the intended beneficiaries of the service for which the state has contracted with the school. The school's authority over its faculty derives from the contractual relationship of employment, not from "state law." The school does not perform any public function toward them, even if it may (although we do not now decide the issue) perform such a function toward some or all of its students.

Nor are we persuaded by the argument that the relationship between the school and the state is mutually beneficial, or "symbiotic," as was found to be the case in *Burton*.[22] Any contractual relationship is beneficial to both contracting parties; otherwise they would not enter into it. As we read *Burton*, the importance of the mutually beneficial relationship was that the state benefited from the particular conduct under attack — the racial discrimination by the restaurant — at least to the extent that that conduct increased the restaurant's business and bolstered its ability to pay rent to the state. We see no such benefit to the state from the conduct under attack here.

The school's funding, regulation, and function all show a relationship of close cooperation with the state. But these factors, together as well as separately, do not demonstrate that the state has so dominated the school as to make all the school's actions, and particularly those related to personnel, attributable to the state.[23] The school's management by a private

[22] We note that the phrase "symbiotic relationship" does not appear in *Burton* at all. That phrase originated with the Court's discussion of *Burton* in its opinion in *Moose Lodge*, 407 U.S. at 175, and was repeated in the same context in *Jackson*, 419 U.S. at 357.

[23] We have found only two cases at the circuit court level involving the combination of factors present here. In *Ginn* v. *Mathews*, 533 F.2d 477 (1976), the Ninth Circuit found the fifth amendment applicable to the discharge of employees by a federally and state-funded and regulated Head Start program. There, however, hiring and firing were under the control of a Board of Directors, the composition of which was controlled in part by the regulations. *Compare Kelley* v. *Action for Boston Community Development*, 419 F. Supp. 511 (D. Mass. 1976) (finding no governmental action in the

Board of Directors on which the state is not represented, and the broad range of independent discretion which these directors appear to exercise, particularly in personnel matters, belie the notion of state domination.

The five plaintiffs in case No. 80-1451 rely solely on the overall relationship between the school and the state, and, unlike Ms. Rendell-Baker in case No. 80-1328, *infra*, do not claim any direct involvement of the state in their discharge. For the above reasons, we hold that the district court erred in case No. 80-1451 in denying the school defendants' motion to dismiss. Ms. Rendell-Baker does claim state action even in the absence of an overall state dominance of the school. Her case therefore requires further discussion.

IV.

Ms. Rendell-Baker's arguments are essentially two: first, that because her position was created and funded through the grant of a state agency, she was a public employee even if the other staff members were not; and second, that the Committee directly reviewed and approved her discharge, as evidenced by its exchange of letters with the school. Ms. Rendell-Baker's first argument fails to distinguish her from many other employees of private organizations whose positions are funded by grants from government agencies, foundations, and even private corporations. It is common practice for universities, schools, hospitals, and community organizations to seek and obtain funding for specific positions through grants from these various public and private sources. The individuals employed are not treated as employees of the funding source; rather, they are employees of the grantee. Nor does Ms. Rendell-Baker

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discharge of a Head Start employee). In *Hines* v. *Cenla Community Action Committee, Inc.*, 474 F.2d 1052 (1973), the Fifth circuit found no federal responsibility for the dismissal, by a privately appointed board of directors, of the executive director of a community action agency which was funded and regulated by the Office of Economic Opportunity.

suggest that she was ever treated, or ever considered herself, an employee of anything but the New Perspectives School. She was chosen for the position and supervised in it by the school's administration, and we have no reason to suspect that she ever had any dealings with the Committee on Criminal Justice or the Town of Brookline until after her discharge.[84]

Ms. Rendell-Baker's second argument carries somewhat more weight. The exchange of letters, which we have summarized in our statement of facts, between the school and the Committee suggests that at least the one Committee official who wrote the letters viewed himself as having some authority to oversee the manner in which the school discharged an employee funded by the grant. Moreover, that official ultimately did determine that the school's procedure met some undefined standard for approval by the Committee. But the Committee's letters do not cite any authority for this oversight, and we have found none in the school's contract with the Committee. The contract provides that the Committee must approve hiring; it makes no provision for approval of firing, nor does it require that any particular personnel policies be observed. If, as defendants' affidavit asserts (and as Ms. Rendell-Baker has not contested), the Committee's approval of hiring consisted only of reviewing the qualifications of the school's chosen candidate, then the Committee had authority to deny its approval for the hiring of a replacement only if it found the candidate's qualifications inadequate, and for no

[84] As we indicated in footnote 8, *supra*, a grant manager of the Committee did report that Ms. Rendell-Baker was considered an employee of the Town of Brookline. But since the grant manager did not elaborate on this observation or cite any evidence for it, and since Ms. Rendell-Baker obviously did not consider herself an employee of the Town (her counsel admits that she did not even know of the Town's involvement in the funding arrangement until discovery), the grant manager must have been mistaken.

other reason. Nothing in the contract suggests that the Committee is allowed to control the school's personnel policies by exercising its approval powers arbitrarily, as a form of leverage.

The district court's judgment in No. 80-1328 is affirmed.

The district court's order in No. 80-1451 is reversed, and the matter remanded with directions that judgment be entered in that case dismissing the complaint.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SHEILA RENDELL-BAKER,
Plaintiff,

v. CIVIL ACTION
NO. 77-2236-C

SANDRA KOHN, et al.,
Defendants.

MEMORANDUM

April 16, 1980

CAFFREY, Ch. J.

In 1977 plaintiff, Sheila Rendell-Baker filed this action alleging that she had been discharged from her position as vocational counselor at New Perspectives School, Inc. in Brookline, Massachusetts in violation of her rights under the First, Fifth and Fourteenth Amendments and 42 U.S.C. §1983. Plaintiff invoked the jurisdiction of this court pursuant to 28 U.S.C.A. §§ 1331, 1343, 1361 and 2202.

The complaint as amended names as defendants, New Perspectives School, Inc., the members of that school's board of directors both individually and in their "their official capacities" (hereinafter the school defendants), as well as Francis X. Bellotti, Chairman of the Massachusetts Committee on Criminal Justice (hereinafter the Committee) and Robert J. Kane[1], Executive Director of the Committee (hereinafter the State defendants).[2]

The matter is currently before the court on a motion for summary judgment filed by defendants Bellotti and Highgas. In support of their motion the state defendants argue that the court has no

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[1] Mr. Kane has since been replaced as Executive Director by William Highgas, Jr. who is now defending this action.

[2] Although two federal defendants were named in the original complaint, their motion to dismiss was allowed by the Court in 1979.

subject matter jurisdiction over the controversy because the plaintiff's termination was not sufficiently imbued with with state action to trigger constitutional safeguards. They further argue that even if the court does find that the complained of actions were "under color of state law", the State defendants cannot be charged with responsibility for the plaintiff's dismissal. Plaintiff opposes the motion and the parties have submitted affidavits to the court in support of their respective positions.

It is assumed for purposes of this motion that the Plaintiff was dismissed as a result of a legitimate exercize of her free speech and that her dismissal was not accompanied by the procedural safeguards which would be required if the action were attributable to the State. It is also conceded that at all times pertinent to

the complaint, the School was subject to extensive state regulation and was the recipient of substantial public funding.

New Perspectives School, Inc. is incorporated under the laws of the Commonwealth of Massachusetts and operates as an alternative high school for students who have trouble functioning in a traditional high school setting. It is funded in large part by local, state and federal sources and is subject to extensive governmental regulation. At all times pertinent to the complaint New Perspectives School was the recipient of funds from the Massachusetts Committee on Criminal Justice and the position of the plaintiff as vocational counselor was funded by that particular source.

The Massachusetts Committee on Criminal Justice was established pursuant to Mass. Gen. Laws, ch.6, §156 and is

comprised of various State officials and appointees. As one of its duties the Committee accepts funds from the Law Enforcement Assistance Administration (hereinafter LEAA) and awards subgrants to eligible applicants within the state.

Plaintiff argues that the Commonwealth of Massachusetts is so thoroughly intertwined with the day to day functions of the school as to warrant the conclusion that any action taken by the school is state action.[3] Plaintiff

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[3]Plaintiff asserts that the state action requirements may be satisfied even in the absence of a nexus between the state and the challenged activity. In so arguing she relies on Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) and the language of the Court of Appeals for the First Circuit in Berrios v. Inter American University, 535 F.2d 1330 (1976). This Court accepts the correctness of the legal principles enunciated by plaintiff especially in light of Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978) cert. denied 439 U.S. 910 (1978). However, the allegations of state involvement in the general management of the school which appear in the

(footnote 3 cont'd on next page)

points to the substantial state funding provided to the school and the extensive state regulation to which the school is subject. Plaintiff also maintains that the school performs a traditionally public function in that it provides its students with a free education, provides a non resident drug treatment program and generally furthers the goals of the State's criminal justice system. Plaintiff further argues that the school could not have terminated her employment without the approval of the Committee.

The State defendants argue that the School does not perform a traditionally public function and that substantial state

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(footnote cont'd from previous page)

complaint and in the additional materials submitted for purposes of opposing this motion, do not approach a level of involvement which would suggest that a symbiotic relationship may have existed between the school and the state. Further discussion on that issue is therefore unwarranted.

funding and regulation alone do not necessarily give rise to a finding of state action. They maintain that there must be direct state involvement with the complained of activity. The State defendants further argue that although the Committee plays a role in the hiring[4] of personnel, it has nothing to do with post hiring personnel decisions. Thus, they conclude, that there can be no direct

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[4]Applications to the Committee for the award of a subgrant must provide the Committee with a program description which contains the job qualifications and responsibilities of staff hired in the course of implementing the program. If a subgrant application is approved, that program description is incorporated into a standard contract which also contains certain conditions incident to funding. One such condition is that the "[p]rior approval of the committee is required for staff hiring. . ." Such approval usually consists of a review whether the qualifications stated therein are consistent with the qualifications which were proposed by the applicant (in this case New Perspectives School, Inc.) and approved by the Committee. The Committee does not conduct job interviews.

state involvement in the activity complained of in this case.

"A cause of action under § 1983 requires that a state, not a private party, act to deprive one of constitutionally protected rights." Berrios v. Inter American University, supra at 1331. There are occasions however when the actions of a private party may be attributed to the state. Burton v. Wilmington Parking Authority, supra.

While the court agrees with the defendants that New Perspectives School, Inc. does not perform a uniquely public function, some further discussion is necessary on the issue of whether the state involvement here went beyond substantial funding and extensive regulation and extended to the complained of activity itself.

> Our inquiry must be, as the court put in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S. Ct. 449, 453, 42 L.E. 2d 477 (1974) "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Lamb v. Rantoul, 561 F.2d 409 (1st Cir. 1977), Krohn v. Harvard Law School, 552 F.2d 21 (1st Cir. 1977).

Although the recipients of funding are subject to the rules, regulations and directives of the committee and although the committee may impose special conditions in a given case, there are no regulations or conditions in the case at bar which relate to the suspension or termination of individuals employed by the school. The Committee does play a role however in the decision to hire personnel. In a letter dated February 23, 1977 the

school was informed by the Committee's General Counsel, Mr. Tobin:

> While the Committee makes no comment on the matter, [plaintiff's termination], you are advised that no candidate to fill the subject position will be approved until such time as you provide me with written justification of your action, specifically citing any rules and regulations under which the action was taken.

In two subsequent letters the school outlined both its reasons for the decision to terminate the plaintiff's employment and the termination procedures which it had followed. Although satisfied with the School's outline, Mr. Tobin cautioned the School as follows:

> You are advised, however, that if you move to fill the vacant position and you choose to expend funds, you will not have LEAA money available to meet a successful claim for back pay by Ms. Rendell-Baker. Payment of such a claim would be allowable to the extent that the salary remains unexpended. LEAA funds may not be used to pay any other form of damages or any fines or penalties

that might be levied against the New Perspectives School, Inc.

I rule that the decision as to whether or not the plaintiff's employment should be terminated and the decision as to whether or not she should be replaced are two separate and distinct matters. The former was a determination to be made by the School alone. The Committee was involved only with the latter. There is no indication in the case at bar that the power of New Perspectives School, Inc. to terminate its employees was in any way "circumscribed" by the Committee. See McQueen v. Druker, 438 F.2d 781, 784-85 (1st Cir. 1971).

On the basis of the foregoing I rule that there was no state action because there was not a "sufficiently close nexus" between the committee and plaintiff's termination upon which this court may base a ruling that the actions of the school

are properly attributable to the state for purposes of federal jurisdiction.

The State defendants' motion should be allowed. A fortiori the action should be dismissed as to all remaining defendants.

Order Accordingly.

/s/Andrew A. Caffrey
Andrew A. Caffrey, Ch. J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SHEILA RENDELL-BAKER,
Plaintiff,

v. CIVIL ACTION
NO. 77-2236-C

SANDRA KOHN, et al.,
Defendants.

ORDER

April 16, 1980

CAFFREY, Ch. J.

In accordance with memorandum filed this date, it is ORDERED:

The action is dismissed against defendants Highgas and Bellotti.

The action is dismissed to all remaining defendants.

/s/Andrew A. Caffrey
Andrew A. Caffrey, Ch. J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WAYNE KLUG, et al,
Plaintiffs
v.
THE NEW PERSPECTIVES SCHOOL, INC., et al,
Defendants

Civil Action
No. 78-2402-MA

MEMORANDUM AND ORDER

Mazzone, D.J. April 7, 1980

The plaintiffs, five teachers at a publicly funded private high school, claim that they were wrongfully discharged without due process for exercising their protected right to freedom of speech, in violation of the First, Fifth and Fourteenth Amendments and 42 U.S.C. §1983. They claim jurisdiction under 28 U.S.C. §§1331 (federal question), 1343 (civil rights) and 1361 (mandamus for federal official). The case is before the Court on the defendants' motion to dismiss. The

threshold jurisdictional question is whether the defendants, the New Perspectives School, its Staff Director and Board of Directors, acted under color of state law.[1] Because this question can be answered only after carefully "'sifting facts and weighing circumstances,'" Lorentzen v. Boston College, 440 F. Supp. 464, 465 (D.Mass. 1977), aff'd. 577 F.2d 720, cert. denied, 440 U.S. 924 (1979)

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[1]The free speech rights which plaintiffs claim have been violated are considered fundamental for purposes of equal protection analysis and are subject to strict judicial scrutiny in that context. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 n. 3 (1976). We therefore do not address the issue of whether less offensive conduct would be a less appropriate subject for our scrutiny, Weise v. Syracuse University, 522 F.2d 397, 406 (2nd Cir. 1975), an approach which has not been endorsed by this Circuit. Downs v. Sawtelle, 574 F.2d 1, 6 n. 5 (1st Cir. 1978), cert. denied, 439 U.S. 910. Because fundamental rights are involved, whether the School is a "state actor" is a threshold question. Id. at 6.

(quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), the facts are set forth in some detail and are examined in the light most favorable to plaintiffs. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

New Perspectives School is a non-profit Massachusetts corporation. It contracts with governmental agencies to provide tuition-free education for about fifty students who have had difficulty in public high school. Most students have drug-related problems or other special needs. The School provides night classes, extensive counseling services, and vocational placement services. As Staff Director, the defendant, Sandra Kohn, is responsible for the day to day operation of the School, including initial hiring and discharge decisions. In practice,

Kohn sometimes discusses hiring decisions with the staff. The Board of Directors has the ultimate authority to make any decisions affecting the school.

Some students drawn from the Town of Brookline and the City of Boston receive special educational services under Chapter 766 of the Massachusetts Acts of 1972 (Mass. Gen. Laws c. 71B). Others are placed in the School by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. The School, which is located in Brookline, is authorized to issue high school diplomas which are certified by the Brookline School Committee. The Town itself does not maintain facilities to meet the needs of Chapter 766 students. The School must comply with certain town and state regulations concerning minimum curriculum

requirements, total credit requirements and teacher certification requirements. The curriculum of an institution which accepts Chapter 766 referrals must "be equivalent, insofar as the department [of education] deems feasible, to the curriculum for children of comparable age and ability in the public schools." Mass. Gen. Laws. c. 71B, §10. New Perspectives is also subject to Chapter 766 guidelines which establish minimum student-teacher ratios, set policies for teachers' use of physical restraint and isolation to discipline students, require teachers of academic subjects to hold a bachelor's degree (although teachers need not be state-certified), and require that a contracting school set forth its policies for hiring and discharging personnel in writing. A local school committee, not the

contracting institution, determines what services should be provided for each student in a written plan.

The School is also regulated by the terms of its contracts. The Department of Mental Health requires the School to comply with standards established for Drug Treatment Facilities, to accept court referrals, and to grant access to the Department to review student and financial records. The contract with the Boston School Committee likewise gives the Committee the right to inspect the School. If the Committee is dissatisfied with the services, the School may replace them or the Committee may obtain them elsewhere and charge the School. The contract specifies that agents of the School are not "city employees" and that the School

must maintain its own workers' compensation insurance.

The School obtains 85% of its funds directly or indirectly from the Commonwealth, 8% from the federal government (CCJ, LEAA) and 7% from private sources. The Department of Mental Health each month reimburses the School for a fixed amount of expenses, incurred primarily for staff salaries. The Boston School Committee pays a weekly rate fixed by the Commonwealth for each student referred by it under Chapter 766.

It does not appear that the Commonwealth or any of its subdivisions is represented on the Board of Directors or may otherwise control the internal operations of the School, except by withdrawing students, funds or accreditation. The Staff Director's hiring and firing decisions are not subject to state or public

approval or review. The school has experimented with using a student-staff council for self-government, without the approval or participation of the Commonwealth.

For more than a year before plaintiffs were discharged, New Perspectives School had been plagued by discord among staff and students, "manifested by the resignation of over half the faculty...and racial antagonism." Complaint ¶20. On May 22, 1978, the plaintiffs wrote to the Board requesting Kohn's resignation. The letter briefly described problems with staff fragmentation, student drug abuse, and poor morale. It charged that Kohn's poor administration caused these problems in five enumerated respects. The plaintiffs stated that they had discussed the matter with her to no avail. The other

eight teachers and the assistant administrator supported Kohn. The following day, the Board gave Kohn a vote of confidence.

On June 5, 1978, students picketed the Brookline home of the defendant James Schlesinger, president of the Board, to protest conditions at the School and to request Kohn's resignation. On June 6, Kohn directed the staff to tell students that Schlesinger had said that the picketing constituted a disturbance in his neighborhood, that creating a disturbance was against Board policy, and that students who picketed would therefore be suspended. The plaintiffs carried out her request. That same day, the plaintiffs also submitted to the Board a twenty-two page joint affidavit detailing their criticisms of Kohn and requesting her removal. They did not then vent their

complaints about working conditions, but addressed only problems which they attributed to Kohn.

Kohn met with the plaintiffs on June 8. They informed her that two of them had met with a lawyer, who apparently advised them that the "no picket" order was unconstitutional, and that they might subject themselves to civil liability for instructing students to follow the order. Kohn later met individually with each plaintiff, re-affirming the no-picket order and instructing plaintiffs not to tell the students they believed the order was unconstitutional, lest she have to take "appropriate action." Kohn felt that because the student body was so unstable, often coming from broken homes, it was necessary for the staff to present a united front and act as a group authority

figure, as well as to provide individual role models.

On June 15, 1978, a letter from the plaintiffs appeared in the Brookline Chronicle, refuting statements of some Board members which had appeared in a previous article and stating the plaintiffs' belief that the no-picket order was unconstitutional and that their own first amendment rights had been violated. The same day, they informed Schlesinger as president of the Board that they were forming a labor organization.

Kohn discharged four of the plaintiffs on June 16. The fifth plaintiff, Dawn Fonesca, had submitted a letter of resignation dated May 16, 1978. She advised Schlesinger that she wanted to withdraw it on June 8, but he accepted her resignation on June 9. Kohn told the

plaintiffs they were discharged for insubordination and disruption of the School's program. No warnings had been given, no hearing was held and no written statement of the reasons for discharge was made. Plaintiffs' personnel records reflect the charges of insubordination.

The School could be considered a state actor either on the theory that it is a public institution or on the theory that the nexus between the challenged activity and the Commonwealth's involvement is sufficiently close so that the action of the School may be fairly treated as that of the state itself. Krohn v. Harvard Law School, 552 F.2d 21 (1st Cir. 1976); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). That an entity performs a public function does not elevate

all its activities to state action, although public function is one factor to be considered on the question of state action. Id. at 351.

Cases in this Circuit have focused primarily on the extent of state control over the private party and the challenged activity. Downs v. Sawtelle, 574 F.2d 1 (state action existed in physician's sterilization of plaintiff where the entire board of a hospital's directors was initially appointed by the town, Medicare funds provided 30% of its budget and it was subject to "significant" governmental regulation); see also, Krohn v. Harvard Law School, 552 F.2d 21; Berrios v. Inter American University, 535 F.2d 1330 (1st Cir. 1976); Fortin v. Darlington Little League, 514 F.2d 344 (1st Cir. 1975)(state action found in "symbiosis" where Little League used six of town's eight baseball

diamonds, though no state funding or control). The Ninth Circuit, in Ginn v. Mathews, 533 F.2d 477 (1976), found state action by a "private" school maintained for Headstart students, relying on this Circuit's McQueen v. Drucker, 438 F.2d 781 (1st Cir. 1971).

The New Perspectives School appears to serve a primarily public function. Although education is not a "uniquely" public function, Lorentzen v. Boston College, supra, 440 F. Supp. at 465, New Perspectives, unlike the college in Lorentzen serves only students who are entitled by law to receive a carefully tailored high school education from the Commonwealth.

We believe the rationale of McQueen v. Drucker, supra, should be applied here.

The School performs a governmental function because it provides a high school education, as required by and at the expense of the Commonwealth. While there is no direct control by the state over the private firm, and no control over the challenged activity, the programs it offers must comply with state regulations, its staff must meet certain degree requirements, and there is substantial state oversight of its operation. Accordingly, we are of the opinion that there is sufficient involvement by the state to meet the jurisdictional challenge under the "public institution" approach.

We do not accept the defendants' contention that plaintiffs have alleged no deprivation of rights protected by the Constitution or laws of the United States.

The motion to dismiss is denied.

SO ORDERED.

/s/ A. David Mazzone
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

WAYNE KLUG, ET AL	*	EXHIBIT "B"
	*	
v.	*	No. 78-2402-MA
	*	
THE NEW PERSPECTIVES SCHOOL, INC., ET AL	*	

ORDER

IT IS ORDERED that this Court's Memorandum and Order, dated April 7, 1980, which denies defendants' Motion to Dismiss, shall be amended to include the following statement:

> Whether or not defendants should be regarded as state actors is a controlling question of law in this case. While this Court has found that there is sufficient involvement with New

Perspectives School, Inc. by the state to regard the defendants' actions as state action, there is substantial ground for difference of opinion on this point. It is, therefore, this Court's opinion that an immediate appeal from this interlocutory order may materially advance the ultimate termination of this litigation.

/s/ A. David Mazzone
A. David Mazzone
U. S. District Court
Judge

/s/ Helen M. Costulo
Deputy Clerk

Date: June 13, 1980

"MANDATE" [C.A. 77-2236-C]

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 80-1328 [DOCKETED]

SHEILA RENDELL-BAKER,
Plaintiff, Appellant,

v.

SANDRA KOHN, ET AL.,
Defendants, Appellees.

FILED
IN CLERK'S OFFICE
MAR 5 4:25 PM '81
U.S. DISTRICT
COURT
DISTRICT OF
MASSACHUSETTS

JUDGMENT

Entered February 12, 1981

This cause came on to be heard on appeal from the United States District

Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

Costs in favor of appellee, The New Perspective [sic] School, Inc. are taxed at $51.30.

Certified and issued as informal mandate under F.R.A.P. 41 on MAR 5 1981

/s/ Dana H. Gallup
Clerk

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Doyle, Feinberg and Pressman and Ms. Waxman.]

A-60

"MANDATE"

United States Court of Appeals

For the First Circuit

[FILED IN
CLERK'S OFFICE
MAR 11 10:58 AM
'81
US COURT OF AP-
PEALS
FOR THE FIRST
CIRCUIT]

No. 80-1451

WAYNE KLUG, ET AL.,
Plaintiffs, Appellees,

v.

THE NEW PERSPECTIVES SCHOOL, INC., ET AL.,
Defendants, Appellants.

JUDGMENT

Entered February 12, 1981

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is vacated and the matter is remanded to that court with directions that judgment be entered in that case dismissing the complaint.

Costs to appellants.

Costs in favor of appellants are taxed at $455.60.

Certified and issued
as informal mandate
under F.R.A.P. 41 on
MAR 11 1981

/s/ Dana H. Gallup
Clerk

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Doyle, Feinberg and Pressman and Ms. Waxman.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BNA
Date Filed: 5-6-81
Date Received: 5-12

----------x

SUZANNE ROSS,
Plaintiff,

80 Civ. 3422(RWS)
OPINION

-against-

NATHAN ALLEN [correct name NIATHAN ALLEN], Executive Director of Henry Street Settlement, WILLIAM SPILLER, Director of Henry Street School, and ROBERT WOLF, Clinical Director of Henry Street School,
Defendants.

----------x

APPEARANCES:

NEW YORK CIVIL LIBERTIES UNION
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By: STEVEN R. SHAPIRO, ESQ.
ROBERT M. LEVY, ESQ.
Of Counsel

DOUGLAS F. EATON, ESQ.
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New York, New York 10022

Sweet, D.J.

Plaintiff Suzanne Ross ("Ross") brought this civil rights action against the defendants, directors of the Henry Street Settlement ("the Settlement") and the Henry Street School ("the School"), alleging that they violated certain of her constitutional and statutory rights by terminating her employment as a school psychologist after she complained to the Board of Education about their suspension of one student at the school. The case is before me on a motion to dismiss, brought pursuant to Rule 12 (b)(6), Fed.R.Civ.P. The motion is denied in part and granted in part.

The complaint alleges the following facts.

The School was established and operates as a school for handicapped children.

Most of its students are placed there by the New York City Board of Education ("the Board") pursuant to a contractual agreement. The Board retains responsibility for the students' education. It monitors and regulates the School's programs. The School receives substantial government funding, which is channelled to it through the Board as conduit. Some of its facilities are located in government buildings.

Ross was hired by the School in October, 1979. She is a psychologist, whose duties at the School included "psychological evaluation, psychotherapy, and teaching."

In late March of 1980, one of Ross' students was told by officials at the School to stay home indefinitely because of certain behavior problems. The student had no hearing and was not formally

suspended. When Ross learned of this action, she spoke with the defendants. She told Robert Wolf ("Wolf") that her clinical judgment was that it was in the child's best interest to remain in school. She also told the defendants that the School had acted illegally. She read the applicable law to Wolf.

In the face of the defendants' inaction, Ross advised the student and her mother of the student's procedural rights. She also contacted the Child Advocacy Project of the New York City Board of Education, which agreed with Ross about the alleged infraction of the student's rights. Two days later, on April 24, 1980, the School reversed its position and reinstated the student. According to the allegations of the complaint, the student had missed ten days of school. Also on

April 24, Ross was dismissed. She was given two reasons for her dismissal, one, that she had contacted the Board of Education, an "outside agency," about the School's allegedly illegal activities, and two, that she had assumed an inappropriate role as child advocate. Plaintiff appealed that dismissal through internal administrative channels; however, that appeal was unsuccessful.

For purposes of this motion to dismiss, the preceding recitation of facts taken from Ross' complaint is taken as true. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972).

Based on these alleged facts, Ross asserts three separate causes of action. First, she asserts a cause of action under 42 U.S.C. § 1983 for violation of her

First and Fourteenth Amendment rights. Second, she alleges that her rights under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and regulations promulgated thereunder were infringed by her dismissal. Finally, she claims that defendants' actions violated her rights under the Education for All Handicapped Children Act, 20 U.S.C. § 1401, et. seq., (EAHCA) and applicable regulations.

Defendants challenge the legal sufficiency of the complaint on all three grounds. As to the first cause of action, they maintain that the requisite state action to sustain a claim under § 1983 is lacking. As to the second cause of action, they claim that § 504 is inapplicable here because no discrimination on the basis of handicap is alleged. In addition, as to both the second and third

causes of action, defendants contend that Ross lacks standing under the statutes and regulations she invokes.

On a motion to dismiss, "the sole issue is whether under the facts alleged in the plaintiff's complaint it appears to a certainty that the plaintiff is entitled to no relief." Holmes v. Silver Cross Hospital of Joliet, 340 F. Supp. 125, 130 (N.D. Ill. 1972). Under the first two causes of action alleged here, in accordance with the facts as pleaded, Ross may be able to establish entitlement to relief. However, I agree with the defendants that she lacks standing to sue under EAHCA. Accordingly, at this stage of this litigation, I reject defendants' challenge to the legal sufficiency of Ross' first two claims, but grant the motion to dismiss the third.

It is true, as defendants assert, that on her first cause of action plaintiff has the burden of proving that her dismissal was the result of state action. See Jensen v. Farrell Lines, Inc., 625 F.2d 379, 384 (2d Cir. 1980), cert. denied, __ U.S. __, 101 S.Ct. 1359 (1981). However, under this complaint she may be able to carry that burden in accordance with the "state-function" approach to determining state action. Under this approach a court may find state action if "the conduct of the private actor is equivalent to the performing of a state function, or is traditionally associated with sovereignty." Id.

Application of the state function test is problematic. However, light may be shed on the instant case by a comparison of two cases in this Circuit,

Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974) and Lefcourt v. Legal Aid Society, 445 F.2d 1150 (2d Cir. 1971).

Perez was a civil rights action alleging constitutional infringements by, among others, two private child care institutions, the New York Foundling Hospital and St. Joseph's Home for Children. The complaint alleged unconstitutional detention of the plaintiff's children. The court applied the state function test and found that the institutions acted "under color of state law," and were therefore open to suit under § 1983. In doing so, it placed primary reliance on the statutory scheme involved. Under that scheme, the government was charged with primary responsibility for the welfare of needy children, but could discharge that responsibility either

directly or through an authorized agency. The defendant institutions were such authorized agencies. The court found that although it had entrusted the plaintiff's children to those private institutions, the state was "in effect providing the care through [those] institutions," Perez, supra, at 765, and concluded that "[t]his exercise of the administrative placing prerogative does not affect in any way the State's ultimate responsibility for the well-being of the children, and, consequently, the public nature of the function being performed." Id.

In Lefcourt, the plaintiff alleged that his dismissal from service as a Legal Aid Society ("Society") attorney abridged his First and Fourteenth Amendment rights. The Second Circuit affirmed the district court's dismissal of the complaint,

finding that the Society did not perform a public function for purposes of § 1983. The court emphasized the autonomy of the Society, and the fact that its primary duty was to its clients, not to the city. It also stressed the fact that legal representation of criminal defendants is traditionally a private, not a public function, notwithstanding the fact that the state might be forced to assume responsibility for indigent defendants in the absence of organizations such as the Society. See also Graseck v. Mauceri, 582 F.2d 203 (2d Cir. 1978), cert. denied, 439 U.S. 1129 (1979).

This case more closely tracks Perez than Lefcourt. The statutory scheme involved here is, in all relevant respects, indistinguishable from that relied upon by the court in Perez. Under New York

Education Law §§ 4401 et seq., the state has the duty to provide for the educational needs of handicapped children. It can fulfill that duty either through operating programs in the public schools or through contracting with private institutions, but it retains responsibility for the provision of educational services regardless of the means by which they are provided. See N.Y. Education Law § 4402 2.a. Contracts with private institutions are subject to approval by the State Commissioner of Education. Those institutions receiving public financial assistance are subject to inspection by the state.

The Henry Street School operates within this statutory framework. At this stage of this litigation, it would therefore appear to stand in a legal posture

similar to that assumed by the private child care institutions in Perez. Here, as in Perez, it would appear that the state in effect provides the mandated care through the private institution with which it contracts.[1]

Lefcourt is distinguishable in several respects. The School, unlike the Society, is subject to monitoring and regulation and is far from autonomous. Although the issue remains unsettled, education, unlike legal representation, appears to be treated as a more characteristically governmental than private

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[1] Rendell-Baker v. Kohn, No. 80-1451 (1st Cir. 1981), on which defendants rely, is distinguishable. It is not clear from the opinion whether the statutory scheme involved there contemplates retention of responsibility by the state, and the decision does not turn on that factor. Here, by contrast, as in Perez, the state retains responsibility for the provision of the services involved.

function for purposes of state action analysis. See generally Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 163 (1978)(education acknowledged to be more of a public function than dispute resolution, though degree to which states can delegate educational functions and thereby avoid Fourteenth Amendment strictures undecided).

Under Perez, because of the statutory scheme outlined above, and primarily because of the primary responsibility for the education of the handicapped retained by the state, I find that under the allegations of this complaint plaintiff may be able to prove that the actions of the School were state actions. She may therefore be able to sustain a cause of action under § 1983. The motion to dismiss the first cause of action in this complaint is

therefore denied. This denial, of course, in no way suggests pre-judgment of the merits of plaintiff's First Amendment claim. A determination regarding the protection afforded Ross' speech and the factors actually involved in her dismissal must await trial. See generally Snepp v. United States, 444 U.S. 507 (1980); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977); Pickering v. Board of Education, 391 U.S. 563 (1968).

As stated above, the second and third causes of action, the statutory claims, are challenged primarily on standing grounds. The § 504 claim is assailed for the additional reason that the complaint is said not to allege discrimination on the basis of handicap.

At this stage of this proceeding, it is not possible to say with certainty that under this complaint, plaintiff may not be able to prove discrimination on the basis of handicap. It may be that the theory of plaintiff's case will be, and the evidence will show, that the student's behavioral problems that prompted her suspension were linked to her handicap. Such a theory and such proof would support a claim of discrimination on the basis of handicap. See S-I v. Turlington, No. 79-2742 (5th Cir. 1981).

However, even if that is not the nature of plaintiff's claim or proof, it is possible that she may make out a cause of action under § 504 and the regulations promulgated thereunder through other theories and proof not yet advanced. Furthermore, under that statute and those

regulations, I find that she has standing, for the reasons that follow.

A regulation promulgated under § 504 of the Rehabilitation Act mandates that certain procedural rights be afforded handicapped children. See 45 C.F.R. § 84.36. That regulation is buttressed by the incorporation by reference of the anti-retaliation provisions of Title VI of the Civil Rights Act of 1964, see 29 U.S.C. § 794a (2), 45 C.F.R. § 84.61. Under those provisions, Ross, as one who complained of an alleged violation of the Act, is protected against the kind of retaliation her complaint alleges. Because she is in the "zone of interests" meant to be protected by § 504 and these regulations and because she has suffered "injury in fact," Ross has standing to raise a claim under these provisions. See

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

No comparable regulation has been promulgated under the Education for All Handicapped Children act. Despite that, plaintiff argues that an anti-retaliation rule should be implied. She points to the likelihood that the handicapped will lack the knowledge necessary to protect themselves and argues that protecting those who seek to vindicate the rights of the handicapped will ultimately safeguard the handicapped themselves. Plaintiff contends that under this "child benefit theory," she has standing under EAHCA to complain that her dismissal resulted from her attempts to challenge what she saw as a violation of her student's procedural rights.

No cases dealing with this issue and decided under EACHA have been cited to or found by the court. Plaintiff relies on Forrest v. Ambach, Sept. 26, 1980, cal. Nos. 12, 41 (Sup. Ct. Albany Co. Dec. 11, 1980), in which a school psychologist, proceeding under N.Y. Education Law § 310, was found to have standing to contest her dismissal on the ground that it had been motivated by her attempts to comply with the law by providing statutorily mandated evaluations of students, her attempts to protect other rights of handicapped students, and her efforts to expose the school's neglect of its own statutory duties. The court found that the commissioner had been wrong in refusing to consider the petitioner's allegations concerning the reasons for her dismissal. The commissioner's refusal was based on

his determination that the petitioner "lacked standing to challenge respondent's alleged neglect of their statutory duties regarding handicapped children." In overturning the commissioner's decision, the court found that according to petitioner's complaint the respondents' alleged neglect of their statutory duties and disapproval of petitioner's attempts to expose that neglect and fulfill her own duties had resulted in harm to the petitioner. Therefore the court concluded that Forrest had standing.

This case is not on all fours with Forrest. Here, there is no allegation that Ross was fired for acts she was required by law to perform. Ross was not under a statutory duty to inform the student or her parents of their procedural rights. Such a requirement might very

well carry with it legal protection for those performing their duties, but no such requirement is present here.[2]

Ross also argues that the court should imply an anti-retaliation provision here because "almost every civil rights law enacted by Congress in the past twenty years ... contains an anti-retaliation provision either in the statute itself or the implementing regulations." That fact could just as well lead to a conclusion contrary to that which Ross would have me draw. Congress and the administrative agencies have been quite explicit in other

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[2]Ross also relies on Caulfield v. Board of Education of the City of New York, 583 F.2d 605 (2d Cir. 1978). Caulfield does not support her. The issue in Caulfield was not the standing of the teachers, as Ross asserts, but the jurisdiction of the administrative agency. The "child benefit theory" supported that jurisdiction, not the standing of the plaintiffs.

contexts when seeking to afford protection against retaliation. That they did not explicitly do so here could evince an intent to limit the scope of the statute's protection. It could evince mere oversight. But in the absence of congressional or administrative guidance, this court will not imply a provision the legislative and regulatory draftsmen did not themselves adopt.

Finally, even if the School did violate a statutory duty to the student, that violation did not cause the injury Ross complains of here, that is, her dismissal. For that reason, too, I decline to recognize an implied cause of action on Ross' behalf under EAHCA. See Pavolini v. Band-Air Corp., No. 80-9017 (2d Cir. March 26, 1981).

Therefore, the motion to dismiss the third cause of action for lack of standing is granted. The motion to dismiss the first and second causes of action is denied.

IT IS SO ORDERED.

DATED: New York, N.Y.
May 6, 1981

/s/ Sweet
Robert W. Sweet
U.S.D.J.

COMPENDIUM OF STATE SPECIAL EDUCATION STATUTES

In addition to Massachusetts, each of the other forty-nine states has a statute providing for the publicly-funded special education of special needs, handicapped, or exceptional children:

Ala. Code §§ 16-39-1 to 16-39-12 (1975 & Supp. 1980); Alaska Stat. §§ 14.30.180 to 14.30.350 (1975); Ariz. Rev. Stat. §§ 15-1010 to 15-1018 (Supp. 1980); Ark. Stat. Ann. §§ 80-2101 to 80-2143 (1980); Cal. Educ. Code §§ 56000 to 56885 (West Supp. 1980); Colo. Rev. Stat. §§ 22-20-101 to 22-20-114 (1973 & Supp. 1980); Conn. Gen. Stat. Ann. §§ 10-76a to 10-76n (West Supp. 1980); Del. Code tit. 14, §§ 3101 to 3126 (Supp. 1980); Fla. Stat. Ann. § 230.23(4)(m) (West Supp. 1981); Ga. Code Ann. § 32-605a (1980); Hawaii Rev. Stat. § 301-21 to

301-27 (1976); Idaho Code §§ 33-2001 to 33-2006 (Supp. 1980); Ill. Ann. Stat. ch. 122, §§ 14.-1.01 to 14.-14.01 (Smith-Hurd Supp. 1980-81); Ind. Code Ann. §§ 20-1-6-1 to 20-1-6-29 (Burns Supp. 1980); Iowa Code §§ 281.1 to 281.12 (1981); Kan. Stat. §§ 72-961 to 72-981 (1980); Ky. Rev. Stat. §§ 157.200 to 157.285 (Supp. 1980); La. Rev. Stat. Ann. §§ 17: 1941 to 1958 (West Supp. 1981); Me. Rev. Stat. tit. 20, §§ 3121 to 3132 (Supp. 1980); Md. Educ. Code Ann. §§ 8-401 to 8-415 (Supp. 1980); Mich. Stat. Ann. §§ 15.41701 to 15.41766 (1979); Minn. Stat. § 120.17 (1980); Miss. Code Ann. §§ 37-23-1 to 37-23-157 (1972 & Supp. 1980); Mo. Ann. Stat. §§ 162.670 to 162.995 (Vernon Supp. 1981); Mont. Rev. Codes Ann. §§ 20-7-401 to 20-7-456 (1979); Neb. Rev. Stat. §§ 43-641 to 43-653 (1978 & Supp. 1979 & 1980); Nev.

Rev. Stat. §§ 395.001 to 395.060 (1979); N.H. Rev. Stat. Ann. §§ 186-A: 1 to 14 (Supp. 1979); N.J. Stat. Ann. §§ 18A:46-1 to 46-18.1 (1968 & West Supp. 1981); N.M. Stat. Ann. §§ 22-13-5 to 22-13-8 (Supp. 1980); N.Y. Educ. Law §§ 4401 to 4409 (McKinney Supp. 1980); N.C. Gen. Stat. §§ 115-363 to 115-410 (1978); N.D. Cent. Code § 15-59-01 to 15-59-09 (1971 & Supp. 1977); Ohio Rev. Code Ann. §§ 3323.01 to 3323.16 (Baldwin 1980); Okla. Stat. Ann. tit. 70, §§ 13-101 to 13-111 (West 1972 & Supp. 1980); Or. Rev. Stat. §§ 343.035 to 343.307 (1979); Pa. Stat. Ann. tit. 24, §§ 13-1371 to 13-1397 (Purdon Supp. 1981); R.I. Gen. Laws §§ 16-24-1 to 16-24-16 (1970 & Supp. 1980); S.C. Code §§ 59-33-10 to 59-33-90 (1977 & Supp. 1980); S.D. Compiled Laws Ann. §§ 13-37-1 to 13-37-24 (1975 & Supp. 1980); Tenn. Code Ann. §§

49-2902 to 49-2959 (1977 & Supp. 1980); Tex. Educ. Code Ann. tit. 2, § 16.104 (Vernon Supp. 1980); Utah Code Ann. §§ 53-18-1 to 53-18-8 (1970); Vt. Stat. Ann. tit. 16, §§ 2941 to 2954 (1968 & Supp. 1980); Va. Code §§ 22.1-213 to 22.1-222 (1980); Wash. Rev. Code Ann. §§ 28A.13.005 to 28A.13.080 (Supp. 1980); W. Va. Code §§ 18-20-1 to 18-20-6 (1977 & Supp. 1980); Wis. Stat. Ann. §§ 115.76 to 115.89 (West 1973 & Supp. 1980); Wyo. Stat. §§ 21-14-101 to 21-14-106 (1977).

COMPENDIUM OF PRIVATE SCHOOL PROVISIONS IN STATE SPECIAL EDUCATION STATUTES

In addition to Massachusetts, forty-one of the other forty-nine states provide for the performance of publicly-funded special education of special needs, handicapped, or exceptional children by private entities:

Ala. Code § 16-39-6(5) (1975); Ariz. Rev. Stat. § 15-1015(G) (Supp. 1980); Ark. Stat. Ann. § 80-2117 (1980); Cal. Educ. Code §§ 56365 to 56366.5 (West Supp. 1980); Conn. Gen. Stat. Ann. § 10-76d(d) (West Supp. 1980); Del. Code tit. 14, § 3124 (Supp. 1980); Fla. Stat. Ann. § 230.23(4)(m)(2) (West Supp. 1981); Ga. Code Ann. § 32-605 (a)(c)(1)(1980); Idaho Code § 33-2004 (Supp. 1980); Ill. Ann. Stat. ch. 122, § 14-7.02 (Smith-Hurd Supp.

1980-81); Ind. Code Ann. § 20-1-6-19 (Burns Supp. 1980); Iowa Code § 281.2 (1981); Kan. Stat. Ann. § 72-967(5) (1980); Ky. Rev. Stat. § 157.280 (Supp. 1980); La. Rev. Stat. Ann. § 17:1949 (West Supp. 1981); Me. Rev. Stat. tit. 20, § 3125(2) (Supp. 1980); Md. Educ. Code Ann. § 8-409 (Supp. 1980); Minn. Stat. § 120.17(2)(h) (1980); Mo. Ann. Stat. § 162.750 (Vernon Supp. 1981); Mont. Rev. Codes Ann. § 20-7-423 (1979); Neb. Rev. Stat. §§ 43-642 and 43-645(5) (1978 & Supp. 1979 & 1980); Nev. Rev. Stat. § 395.010 (1979); N.H. Rev. Stat. Ann. § 185-A:7 (1977); N.J. Stat. Ann. § 18A:46-14(g) (West Supp. 1981); N.M. Stat. Ann. § 22-13-8 (Supp. 1980); N.Y. Educ. Law §§ 4401 (2)(e)-(h) and 4402(2) (McKinney Supp. 1980); N.C. Gen. Stat. § 115-377 (1978); N.D. Cent. Code § 15-59-07 (Supp. 1977); Okla. Stat. Ann.

tit. 70, §§ 13-101(3) (West Supp. 1980); Or. Rev. Stat. § 343.221(4) (1979); Pa. Stat. Ann. tit. 24, §§ 13-1372(3) and 1377 (Supp. 1981); R.I. Gen. Laws § 16-24-10 (1970); S.C. Code § 59-33-50 (1977); S.D. Compiled Laws Ann. § 13-37-7 (1975); Tenn. Code Ann. §§ 49-2902(f) and 49-2913(E) (1977); Tex. Educ. Code Ann. tit. 2, § 16.104(k) (Vernon Supp. 1980); Utah Code Ann. § 53-18-2 (1970); Vt. Stat. Ann. tit. 16, §2944(a) (Supp. 1980); Va. Code § 22.1-216 (1980); Wash. Rev. Code Ann. §§ 28A.13.030 and 28A.13.045 (Supp. 1980); Wis. Stat. Ann. § 115.83(1)(a)(2) (West Supp. 1980).

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 80-2102

In the Supreme Court of the United States

OCTOBER TERM, 1981

SHEILA RENDELL-BAKER,
PETITIONER,

v.

SANDRA KOHN, ET AL.,
RESPONDENTS,

WAYNE KLUG, ET AL.,
PETITIONERS,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 12, 1981
CERTIORARI GRANTED OCTOBER 13, 1981

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The following items are contained in the Appendix to the Petition for Certiorari ("PA") and are not reproduced herein:

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Compendium of State Special Education Statutes.. P.A. 85

Compendium of Private School Provisions in State Special Education Statutes..... P.A. 89

GENERAL DOCKET

United States Court of Appeals
For the First Circuit

Case No. 80-1328

SHEILA RENDELL-BAKER,
PLAINTIFF, APPELLANT,

vs.

SANDRA KOHN, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[641 F.2d 14]
CONSOLIDATED WITH 80-1451.

No. below: 77-2236
Judge below: J. Caffrey
Date of Judgment: Order: April 16, 1980
Notice of appeal filed: May 15, 1980
[Civil Rights]

DOCKET ENTRIES

1980	*Filings—Proceedings*
May 16	Copy of Notice of Appeal along with district court docket entries received and filed and case docketed. (cb)
May 22	Record on appeal in one volume, with exhibits, received & filed. Notices mailed. (mn)
May 23	Appearance of Matthew M. Feinberg, Esquire for appellees received and filed. (cb)
May 23	Appellant's Statement pursuant to First Circuit Rule 8(a) received and filed. (cb)

1980 *Filings—Proceedings*

June 26 Brief for appellant and appendix received and filed. Notices mailed. [jc]

July 10 Assented to motion filed. Order (Coffin, Ch. J.) enlarging time for appellees to file their brief to and including August 12, 1980. Notices mailed. [eam]

Aug. 8 Brief for appellee, received & filed. (mn)

Aug. 13 Motion filed. Order (Bownes, J.) granting leave to appellees to file their brief instanter. Brief for appellee filed. Notices mailed.

Sept. 29 Assigned for hearing at the October, 1980 session. [jc]

Oct. 6 Appearance of Betty Warman for Appellee received and filed. Heard by Coffin, Campbell & Bownes, J.J. [lam] Appearance of Robert H. Doyle, for appellant, received and filed. (mn)

1981

Feb. 12 JUDGMENT: The judgment of the district court is affirmed. Notices mailed. Opinion of the court by Campbell, J. (jmv)

Feb. 20 Itemized and verified bill of costs received and filed. Notices mailed. [eam]

Mar. 5 Taxation of costs filed. Mandate issued, copy filed and original papers returned to the district court. Notices mailed. [eam]

June 19 Notice of filing petition for certiorari (80-2102) June 12, 1981. [lam]

Oct. 16 Order of Supreme Court granting certiorari (80-2102) October 13, 1981. [lam]

GENERAL DOCKET

United States Court of Appeals
For the First Circuit

Case No. 80-1451

WAYNE KLUG, ET AL.,
PLAINTIFFS, APPELLEES,

vs.

THE NEW PERSPECTIVES SCHOOL, INC., ET AL.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[641 F.2d 14]
CONSOLIDATED WITH 80-1328.

No. below: C.A. 78-2402
Judge below: J. Mazzone
Date of Judgment:
Notice of appeal filed:
[Civil Rights]

DOCKET ENTRIES

1980	*Filings—Proceedings*
June 23	Defendants' Petition for Permission to Appeal an Interlocutory Order under 1292(b) F.R.A.P. Rule 28(c) received and filed. (cb)
July 7	Plaintiffs' opposition to defendants' petition for permission to appeal interlocutory order filed. [gvc]
July 8	Order (Coffin, Ch. J.) granting leave to The New Perspectives School, Inc., et al. to appeal pursuant to 28 U.S.C. SEc. 1292(b) from the order of the

1980 *Filings—Proceedings*

U.S. District Court. It is ordered that the time for appellants to file their statement of issues and designation is to be filed on or before July 18, 1980, appellants are to serve their brief and appendix on or before August 12, 1980; and appellees are to file their brief on or before September 2, 1980. It is further ordered that this case be consolidated with case number 80-1328 for purpose of argument. These cases are assigned for the October, 1980 session. Notices mailed. [jc]

July 9 Record on appeal received and filed. [jc]

Aug. 13 Appellants' motion to file brief and appendix late, and appellants' motion to file late notice of agreement as to contents of appendix filed. Order (Bownes, J.) granting said motions. Notices mailed. Brief and appendix for appellants filed. [lam] Notice of agreement as to contents of appendix filed. [lam]

Aug. 29 Brief for appellee, received & filed. (mn)

Sept. 29 Assigned for hearing at the October, 1980 session. [jc]

Oct. 6 Heard by Coffin, Campbell & Bownes, J.J. [lam] Appearance of Kurt Pressman, for Wayne Klug, et al., filed, and appearance of Matthew H. Feinberg, for appellants, received and filed. (mn)

1981

Feb. 12 JUDGMENT: The order of the district court is vacated and the matter is remanded to that court with directions that judgment be entered in that case dismissing the complaint. Costs to appellants. Notices mailed. Opinion of the court by Campbell, J.

Feb. 20 Itemized and verified bill of costs received and filed. Notices mailed.

1981		*Filings—Proceedings*
Mar.	6	Appellees' Objection to appellants' verified bill of costs filed. Order (Campbell, and Breyer, J.J.) denying appellees' objection to appellants' verified bill of costs. Notices mailed. [jc]
March	11	Taxation of costs filed. Mandate issued, copy filed and original papers returned to the district court. Notices mailed. [eam]
June	19	Notice of filing petition for certiorari (80-2102) June 12, 1981. [lam)
Oct.	16	Order of Supreme Court granting certiorari (80-2102) October 13, 1981. [lam]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

No. 77-2236-C

SHEILA RENDELL-BAKER,
PLAINTIFF,
v.
SANDRA KOHN, ET AL,
SUSAN ALFORD, STEPHEN GOLDENBERG, RODNEY JACKSON,
JAMES SCHLESINGER, RINA WALD SPENCE, EDWARD ZARSKY,
NEW PERSPECTIVES SCHOOL, INC.,
DEFENDANTS.

CIVIL RIGHTS

DOCKET ENTRIES

1977		*Proceedings*
July	28	Complaint filed.
	28	Motion for appointment of process server. filed.
	28	Summonses issued.
Aug.	22	Stipulation to enlarge tiem for filing of answer by Francis X Bellotti and Robert J. Kane to Aug. 25, 1977 filed.
	26	Return of summons with service on Sandra Ford on Aug. 11, 1977, filed—on Susan Ford on Aug. 11. 1977; on Edward Zarsky on July 29, 1977; on Rodney on Wug. 11, 1977; on Francis X. Bellotti on July 29, 1977; on Robert J. Kane on July 29, 1977; on James W. Schlesinger on July 29, 1977; and on New Perspectives School, Inc. on July 29, 1977 filed.
	29	Motion of defts. Francis X. Bellotti and Robert to dismiss filed. c/s

1977		*Proceedings*
Sept.	6	Opposition to motion to dismiss of defts. Francis X. Bellotti and Robert J. Kane filed. c/s
	9	Pltff.'s 1st set of interrogs. to deft. Robert J. Kane filed. c/s
	28	Summons returned with service on Stephen Goldenberg on Sept. 19, 1977 and filed.
	28	Summons returned with service on Rina Wald Spence on Sept. 19, 1977 and filed.
Oct.	7	Motion to extend time for filing brief (pltffs.') in opposition to defts. Bellotti and Kane's motion to dismiss until after the filing of motions by other defts. filed.
	7	Motion of pltff. to extend time for filing brief filed. Oct. 7, 1977. ALLOWED. Counsel notified.
	27	CAFFREY, CH.J. Call for hearing on defts.' motion to dismiss; no one appeared.
Nov.	9	Default issued against the defts., Sandra Kohn, Susan Alford, Stephen Goldenberg, Rodney Jackson, James Schlesinger, Rina Wald Spence, Edward Zarsky, New Perspectives School, Inc. for failure to answer complaint served on July 29, 1977, Aug. 11, 1977 and Sept. 19, 1977 and pursuant to request filed by pltff. on Nov. 4, 1977. Copies to defaulted deft.s.
	15	Pltff.'s demand for production of documents to defts. Bellotti and Kane, filed. c/s
	17	Deft. Bell and Gregg's motion to dismiss, FILED. c/s
	22	Pltff.'s opposition to motion of defts. Bell and Gregg to dismiss action filed. c/s
	28	Notice of delinquency re defts. except State and Federal defts. withdrawn
Dec.	5	Appearance of Stephen B. Goldenberg, Esq. of Esrael & Goldenberg as atty. for the defts. Kohn, Alford, Goldenberg, Hackson, Schlesinger, Spence, Zarsky, and New perspectives School, Inc. filed.

1977		*Proceedings*
Dec.	5	Answers of Stephen B. Goldenberg, Rodney Jackson, James Schlesinger, Rina Wald Spence, Edward Zarsky, Susan Alford, Sandra Kohn, and The New Perspectives School, Inc. received.
	5	Motion for leave to file answers late filed. c/s Affidavit in support of motion to file answers late attached.
	6	Certificate of service re above motion filed.
Dec.	12	CAFFREY, CH.J. MOTION of defts. for leave to file answer late ALLOWED. Answers filed. Counsel notified.
Nov.	18	Marshal's return of summons with service on defts. on Aug. 11, 12 and Sept. 19, 1977 filed.
1978		
Jan.	11	Pltff.'s 1st demands for production of documents to deft. James W. Schlesinger filed.
	11	Pltff.'s 1st set of interrogs. to deft. Kohn filed. c/s
	16	Pltff.'s 1st set of interrogs. to New Perspective School, Inc. filed. c/s
Mar.	6	Motion of pltff. to compel production of documents by James W. Schlesinger filed. c/s
	6	Motion of pltff. to compel answers to p.'s 1st set of interrogs. to d. New Perspectives School, Inc. filed. c/s
	6	Pltff.'s 1st set of interrogs. to deft. Rodney Jackson filed. c/s
	6	Motion of pltff. to compel answers to p.'s 1st set of interrogs. to deft. Kohn filed. c/s
	21	Motion of deft. Bellotti and Kane to extend time to respond to pltff.'s discovery requests filed. Assented to. (30 days) Assented to.
	23	Pltff.'s 1st set of interrogs. to deft. Rina Wald Spence filed. c/s
	24	Pltff.'s 1st set of Interrogs. to deft. Edward Zarsky filed. c/s

1978		*Proceedings*
April	4	CAFFREY, CHJ. Motion of pltff. for order compelling 1st set of interrogs. answers to from deft. ALLOWED. (deft. Kohn)
	4	CAFFREY, CHJ. Motion to compel answers to pltff.'s 1st set of interrogs. to deft. New Perspectives School, Inc. ALLOWED. Counsel notified.
	4	CAFFREY, CH.J. Motion of pltff. to compel production of documents from deft., James W. Schlesinger ALLOWED. Counsel notified.
May	26	Motion for entry of default against New Perspectives School filed. c/s
	26	Motion for entry of default against Sandra Kohn filed. c/s
	26	Motion for entry of default against James W. Schlesinger filed. c/s
	31	Motion to compel answers to pltff.'s 1st set of interrogs. to deft. Edward Zarsky filed. c/s
	31	Pltff.'s 1st set of interrogs to deft. Susan Alford filed. c/s
June	1	Motion to compel answers to pltff.'s 1st set of interrogs. to deft. Rina Wald Spence filed. c/s
	15	Motion if the pltff. for leave to amend complaint and for leave to serve new parties filed. c/s
	21	Motion to compel answers to plaintiff's first set of interrogatories to defendant Rina Wald Spence/ ALLOWED. Copies to Counsel.
Jul	7	Notice of delinquency issued against Susan Alford, deft. for failure to answer pltff.'s interrogs. 1st set. Copies to counsel.
Jul	25	Motion to file answers to pltff.'s 1st set of interrogs. late filed. c/s Affidavit of Stephen B. Goldenberg filed.
	25	Deft. Sandra Kohn's answers to pltff.'s 1st set of interrogs. filed. c/s

1978		*Proceedings*
Jul	25	Motion to file answers to pltff's 1st set of interrogs. late filed. c/s
	25	Deft. New Perspectives School Inc.'s answers to pltff.'s 1st set of interrogs. filed. c/s
	24	CAFFREY, CH.J. Motion for leave to amend complaint and for leave to serve new parties. Deft. Counsel notified.

1979		
Feb.	7 01	Application for notice of delinquency for deft Rina Wald Spence for failure to answer interrogs of 3/23/78, filed.
	02	Application for notice of delinquency for deft Rodney Jackson for failure to answer interrogs of 3/6/78, filed.
	03	Application for notice of delinquency for deft. Edward Zarsky for failure to answer interrogs of 3/24/78, filed.
	7 04	Notice of delinquency issued to defts Spence, Jackson and Zarsky, for failure to answer interrogs. cc/cl.
	12 05	Pltf's motion to compel answers to ints by deft. Alford, FILED. c/s.
	16 06	Pltf's motion for order to compel complete answers to interrogs, FILED. cs. (Re: deft Sandra Kohn)
	20 07	Motion of defts' Bellotti and Kane for leave to withdraw their motion to dismiss, FILED. (Assented to)
	23	CAFFREY, CH.J. Re: document #07 to withdraw motion to dismiss, "Motion Allowed." cc/cl
Feb.	26	CAFFREY, CH.J. Case called for hearing on Defts' motion to dismiss; State defts' motion to

1979		*Proceedings*
		dismiss withdrawn; Arguments on Motion to dismiss of Federal Defts; Pltf to file memo in opposition to Fed. defts motion to dismiss; then under advisement.
26	08	Pltf's memorandum in opposition to motion of defts Bell and Gregg to dismiss pltf's action, FILED.
Mar. 6	09	Pltf's motion to compel answers to interrogs to defts Zarsky, Jackson and Spence, FILED. cs.
	10	Plt's motion for entry of default for failure of deft Schlesinger to produce documents, FILED. cs.
	11	Affidavit in support of motion for entry of default, FILED. cs.
12	12	Pltf's request for production of documents to New Perspectives School—first set, FILED. cs.
Apr. 2		CAFFREY, CH.J. Case called for hearing on Pltf's motion to default and 3 motions to compel answers; Answers to be filed by 4/6/79 and response to request to produce to be filed by 4/6/79.
Apr. 6	13	Motion for leave to defts Spence, Zarsky and Jackson to ans ints and for Schlesinger to file Rule 37 response to extend time to 4/13/79, FILED. (Assented to)
6		CAFFREY, CH.J. Re: document #13 to extend time—"Motion Allowed." cc/cl.
Apr. 12		CAFFREY, CH.J. Re: motion of defts Bell and Gregg to dismiss, (filed on 11/17/77) "Motion Allowed." cc/cl.
23	14	Pltf's motion for entry of default against defts Zarsky, Jackson and Spence, FILED. cs.
	15	Pltf's motion to compel production of documents from deft New Perspectives School, FILED. cs.

1979		*Proceedings*
April 24	16	Pltf's motion for entry of default against deft Schlesinger, FILED. cs.
	17	Pltf's motion for entry of default against deft Kohn, FILED. cs.
	18	Pltf's motion for entry of default against deft Alford, FILED. cs.
May 11		CAFFREY, CH.J. Re: documents #16, 17 and 18 for entry of default, "Motions Denied." cc/cl.
15		CAFFREY, CH.J. Re: #14 for entry of default—"Motion Denied." Re: #15 to compel production—"Motion Denied." cc/cl.
Sept. 13	19	Pltf's motion for sanctions for failure of defts to provide discovery, FILED. cs.
18	20	Deft's motion to file answers to pltf's interrogs and response to requests for documents late, FILED. (Assented to) With answers rec'd for filing.
24		CAFFREY, CH.J. Re: #20 to file ans and response to request for production late—"Motion Allowed." cc/cl.
24	21	Deft Susan-Alford Sandman's answers to pltf's first set of interrogs, FILED.
	22	Deft Edward Zarsky's answers to pltf's first set of ints, FILED.
	23	Deft Rodney Jackson's ans to pltf's first set of ints, FILED.
	24	Deft Rina Wald Spence's ans to pltf's first set of ints, FILED.
	25	Deft Sandra Kohn's further ans to pltf's ints, FILED.
	26	Deft's response to pltf's first demands for production of documents, FILED.
28		Certificate of service re: #20, FILED.
Nov. 9		Letter to Clerk re: change of address of the attorney for the pltff, FILED.

1980			*Proceedings*
Jan.	2	27	Pltff's motion to compel answer to interrog, and for sanctions, against Deft Kohn, FILED, cs.
Jan.	2		CAFFREY, CH.J. Case called for assignment of trial; discovery to be completed by 1/31/80, pending motions set for 2/4/80 at 10:00 AM.
Jan.	23	28	Motion for entry of defaults for the refusal of the Defts' Schlesinger, Kohn and New Perspectives School to furnish discovery. FILED, cs.
Jan.	25	29	Motion for summary judgement of Defts' Bellotti and Highgas. FILED, cs.
		30	Affadavit of William Hifggas, Jr., FILED, c/s.
		31	Defts Bellotti and Highgas' response to Pltff's request for production. FILED, c/s.
		32	Deft's answer to pltff's first set of interrogatories. FILED, c/s.
	29	33	Supplement to Motion for Entry of Defaults. FILED, c/s.
	30	34	Supplemental Affidavit in Support of Motion for Summary Judgment. FILED, cs.
	"	35	Supplemental Affidavit of William Highgas, Jr., FILED, cs.
	"	36	Def's for Bellotti and Highgas's supplemental response to Pltff's request for production, FILED, cs.
Feb.	1	37	Plaintiff's Motion to add William Highgas, Jr., as party defendant, FILED, cs.
	"	38	Plaintiff's opposition to motion for summary judgment of defendants Bellotti and Highgas, FILED, cs.
	"	39	Plaintiff's affidavit in opposition to defendant's Bellotti and Highgas (Kane) Motion for summary judgment, FILED, cs.

1980		*Proceedings*
Feb. 1	40	Affidavit in opposition to motion for summary judgment of defendant Bellotti and Highgas, FILED, cs.
4		CAFFREY, CH.J. Case called for hearing on motion for summary judgment; arguments; memo of deft's in support of motion filed; pltf's memo in opposition to motion filed; taken under advisement.
Mar. 17		CAFFREY, CH.J. Case called for trial assignment; Appearance of Attorrey Anitra D. Lanczi for Pltff filed; Motion for withdrawal of counsel Stephen Goldenberg for deft; filed and "Allowed"; Appearance of Matthew H. Feinberg for deft filed; trial scheduled for 6/2/80 at 10:00 AM.
Mar. 20	41	Deft. New Perspectives School's response to pltff.'s first demand for production of documents, FILED.
"	42	Deft. Sandra Kohn's further answers to pltff.'s first set of interrogatories, FILED.
21		CAFFREY, CH.J., re: 37 motion to add Highgas as party deft., "MOTION ALLOWED", cc/cl.
Apr. 16	43	CAFFREY, CH.J., MEMORANDUM AND ORDER ENTERED..."THE ACTION IS DISMISSED AGAINST DEFENDANTS HIGHGAS AND BELLOTTI. THE ACTION IS DISMISSED AS TO ALL REMAINING DEFENDANTS." cc/cl. and West.
May 9	44	Pltff.'s motion for reconsideration and relief from judgment, FILED. cs.
May 12		CAFFREY, CH.J., re: #44 motion for reconsideration, "MOTION DENIED." cc/cl.
May 15		Notice of Appeal filed w/ c/s. (plaintiff) Filing fee paid.

1980	*Proceedings*
May 21	Certified docket entries and original pleadings sent to the Court of Appeals.
1981	
Feb 12	Opinion received from the Court of Appeals entered....The district court's judgment in Court of Appeals No. 80-1328 is affirmed. The district court's order in 80-1451 is reversed and the matter remanded with directions that judgment be entered in that case dismissing the complaint.
Mar 5	Mandate received from the Court of Appeals entered.....affirmed. Costs in favor of appellee $51.30.
	Original pleadings returned from the Court of Appeals.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

No. 78-2402-MA

KLUG, WAYNE
ANDERSON, CAROLYN
STEIN, PAUL
TILDEN, WILLIAM
FONSECA, DAWN,
PLAINTIFFS,
v.
THE NEW PERSPECTIVES SCHOOL INC., ET AL.,
DEFENDANTS.

CAUSE
42 USC 1983—VIOLATION OF FIRST AND
FOURTEENTH AMENDMENTS

DOCKET ENTRIES

1978			*Proceedings*
Sept	12	01	Verified complaint filed. (TRO and PI requested)
	12		Summons issued.
Dec	12	02	Pltfs' motion for appointment of special process server, filed and ALLOWED.
1979			
Feb	7	03	Summons returned, with service on deft The New Perspectives School 10/28/78.
	7	04	Summons returned, with service on all other defts 1/10/79.
	7	05	Pltfs' request for default of defts, filed.

1979			*Proceedings*
Feb	12	06	Notice of default of defts issued. cc/cl and defts. (Defts defaulted: New Perspectives School, Goldenberg, Gartner, Neimann, Bachrach, Schlesinger, Alford, Goodwin, Hamberg & and Zarsky).
	26	07	Defts' motion for relief from default, filed, c/s.
Mar	5		MAZZONE, J. (by the court) re #07: "Allowed; answer to be filed on or before 3/20/79." cc/cl.
	19	08	Deft's motion to fiel responsive pleadings late. Field Assented to.
May	7	09	Pltf's Request for Default, filed, c/s
		10	Pltf's motion for Default Judgment, filed, c/s Notice of Default, issued. cc/cl
May	10	11	Deft's motion for relief from Default & Leave to file responsive Pleadings, filed.
May	11	12	MAZZONE J— RE: #11 Motion Allowed. Defts motion to dismiss, FILED.
	15	13	Pltfs' opposition to defts' motion for relief from default filed.
Nov	15	14	Motion to extend time for filing Memo of law to Dec. 17, 1979, Assented to.
Nov	26		MAZZONE J RE: #14 Motion Allowed, cc/cl
Dec	17	15	Motion to extend time for filing memo of law in support of motion to dismiss, Assented to.
1980			
Jan	9	16	Motion to extend time for filing memo of law in support of motion to dismiss, Assented to.
	11		MAZZONE J RE: #16 Motion Allowed cc/cl.
	21	17	Pltf's memo of Law in oppo to deft's motion to dismiss or to stay Proceedings, filed.
	25	18	Memo of law in support of deft's motion to dismiss, filed, c/s.

1980			*Proceedings*
Feb	5	19	Defts' amended motion to dismiss, filed. c/s.
Feb	22	20	Pltf's supplemental Memo of Law in oppo to deft's Amended motion to Dismiss, filed c/s.
		21	Affidavit of Wayne Klug in oppo to defts' motion to Dismiss, filed c/s.
	28		MAZZONE J Hearing on defts motion to dismiss; Arguments; Matter taken under advisement.
Apr.	7		MAZZONE J MEMO & ORDER, Motion to dismiss is denied so ordered, cc/cl.
May	1	22	Request for default to deft, filed
	13		Notice of default issued, cc/cl.
	15	23	Agreement to extend time to ans complaint & to remove default, filed.
		24	Deft's ans to complaint, filed, c/s.
	19		MAZZONE J RE: #23 Agreement approved cc/cl.
June	3	25	Deft's motion to amend Order denying deft's motion to dismiss, filed c/s.
	10		MAZZONE J RE: #25 Motion Allowed cc/cl.
	13	26	Pltfs' opposition to defts' motion to amend order denying defts' motion to dismiss, FILED. cs.
		27	Pltfs' memo in opposition to defts' motion to amend order denying defts' motion to dismiss, FILED. cs.
	13	28	MAZZONE, D.J. ORDER re: #25, entered. cc/cl.
	13		MAZZONE, D.J. Re: #25—"Order entered, after reconsideration of motion and opposition thereto." cc/cl.
Jul	2	29	Pltf's oppo to deft's petition for permission to appeal Interlocutory Order, filed, c/s. (Should have been filed in Court of Appeals, Original and copies forwarded on 7/7/80 HMC.)

1980	*Proceedings*
July 9	ORDER received from Court of Appeals, "It is ordered as follows.....This cause is consolidated with Cas Number 80-1328 for purpose of argument and both cases are assigned to the October, 1980 list."
July 9	Certified docket entries and original pleadings sent to Crt. of Appls.
1981	
Feb 12	Opinion received from the Court of Appeals entered.....The judgment in No. 80-1328 is affirmed. The district court's order in No. 80-1451 is reversed and the matter remanded with directions that judgment be entered in that case dismissing the complaint.
Mar 11	Mandate received from the Court of Appeals entered...The order of the district court is vacated and the matter is remanded to that court with directions that judgment be entered in that case dismissing the complaint. Costs in favor of appellants taxed at $455.60. Original pleadings returned from the Court of Appeals.
Mar 12	MAZZONE J Judgment Entered, cc/cl

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.

WAYNE KLUG, CAROLYN ANDERSON,
PAUL STEIN, WILLIAM TILDEN,
AND DAWN FONSECA,
PLAINTIFFS,

v.

THE NEW PERSPECTIVES SCHOOL, INC.; SANDRA KOHN, Individually and As Director of the New Perspectives School, Inc.; JAMES W. SCHLESINGER, Individually and as President of the Corporation and Chairman of the Board of Directors of New Perspectives School, Inc.; STEPHEN GOLDENBERG, JOSEPH GARTNER, JOANNE NEIMAN, DAVID BACHRACH, RODNEY JACKSON, RINA WALD SPENCE, SUSAN ALFORD, RHODA GOODWIN, RITA HAMBERG, TONIA YEE, and EDWARD ZARSKY, Individually and as Members of The Board of Directors of New Perspectives School, Inc.,
DEFENDANTS.

COMPLAINT

Introduction

This is a civil action brought by the plaintiffs, who are teachers and counselors discharged by a publicly funded and regulated school in retaliation for their exercise of their right to freedom of speech and to engage in concerted activities for their mutual aid and protection. This action seeks redress for violations of their constitutional rights to due process, equal protection, and freedom of speech. Injunctive and declaratory relief, as well as damages, is demanded.

Jurisdiction

1. Jurisdiction is conferred upon this Court by 28 U.S.C. §§1331, 1343, and 1361, and the First, Fifth, and Fourteenth

Amendments to the United States Constitution. Jurisdiction is also conferred upon this Court for the entry of declaratory relief under 28 U.S.C. §§2201 and 2202. This action is also authorized by 42 U.S.C. §1983, to redress deprivations of constitutional rights under color of state law.

2. The amount in controversy exceeds $10,000.00 exclusive of costs and interests.

Parties

3. Plaintiff Wayne Klug resides at 308 Brookline Street, Cambridge, Massachusetts. He was employed as a teacher and counselor at New Perspectives School, Inc., from December 1975 until his discharge on or about June 16, 1978.

4. Plaintiff Carolyn Anderson resides at 90 Putnam Avenue, Cambridge, Massachusetts. She was employed as a teacher and counselor at New Perspectives School, Inc. from June, 1975 until her discharge on or about June 16, 1978.

5. Plaintiff Paul Stein resides at 144 Pleasant Street, Cambridge, Massachusetts. He was employed as a teacher and counselor at New Perspectives School, Inc. from May 1977 until his discharge on or about June 16, 1978.

6. Plaintiff William Tilden resides at 64 Washington Court, Quincy, Massachusetts. He was employed as a teacher and counselor at New Perspectives School, Inc. from September, 1977 until his discharge on or about June 16, 1978.

7. Plaintiff Dawn Fonseca resides at 101 Western Avenue, Cambridge, Massachusetts. She was employed as a teacher and counselor at the New Perspectives School, Inc., from September, 1977, until her discharge on or about June 9, 1978.

8. Defendant New Perspectives School, Inc. (hereinafter referred to as the School) is incorporated under the laws of the Commonwealth of Massachusetts, and provides public high school facilities for those students in the Commonwealth who have had difficulty in a traditional high school. It is funded and regulated by local, state, and federal governments and has

as its principal place of business, 74 Green Street, Brookline, Massachusetts. James W. Schlesinger is President of the Corporation.

9. Defendant Sandra Kohn is a resident of Brookline, Massachusetts, and the Staff Director of the New Perspectives School, Inc. As such she is responsible for the day to day operation of the school, including initial decisions as to hiring and discharge. In this capacity, her principal place of business is 74 Green Street, Brookline, Massachusetts.

10. Defendant James W. Schlesinger is a resident of Brookline, Massachusetts, and the President of the Corporation and Chairman of the Board of Directors of the New Perspectives School, Inc. He resides at 215 Clark Road, Brookline, Massachusetts, and has his principal place of business at 74 Green Street, Brookline, Massachusetts.

11. Defendants Stephen Goldenberg, Joseph Gartner, Joanne Neiman, David Bachrach, Rodney Jackson, Rina Wald Spence, Susan Alford, Rhoda Goodwin, Rita Hamberg, Tonia Yee, and Edward Zarsky are members of the Board of Directors (hereinafter referred to as the Board) of the New Perspectives School, Inc. In this capacity they are responsible for the overall operation of the School. Their principal place of business in this capacity is 74 Green Street, Brookline, Massachusetts.

Statement of Facts

12. The plaintiffs were each employed as teachers and counselors at the New Perspectives School, Inc. for the periods of time stated in paragraphs 3-7 above. Their duties consisted primarily of teaching students, counseling students with regard to personal matters, attending staff meetings, and certain administrative duties.

13. Based on the operation and past practice of the School, all the plaintiffs had a reasonable expectation of continued employment, terminable only upon just cause shown.

14. The School is a non-profit Massachusetts corporation which provides tuition-free education to young people who have had difficulty completing high school level study in other public schools. Almost all of the students at the School are referred or sent to the School by the Massachusetts Department of Education or a subordinate state agency, the Division of Youth Services, or some other local or state agency.

15. The School is funded primarily through public funds received from the Commonwealth of Massachusetts through the Committee on Criminal Justice; the Massachusetts Department of Mental Health through the Division of Drug Rehabilitation; and the Massachusetts Department of Education through the Chapter 766 Program. The School also receives funding through the federal Law Enforcement Assistance Agency, and through the Comprehensive Employment and Training Act.

16. The School is accredited and regulated by the state Department of Education, and high school diplomas are certified by the School Committee of the Town of Brookline.

17. The School is regulated through statutes and regulations and funding criteria of each of the funding agencies.

18. The School functions as part of the Commonwealth's educational system and as part of the juvenile delinquency and drug abuse program sponsored by the Commonwealth and the United States.

19. Prior to the dates of their termination, none of the plaintiffs had received any warnings from the Director, Sandra Kohn, or the Board, or the officers of the Corporation, regarding their employment performance. Upon information and belief, the plaintiffs' performance in their work at the School was satisfactory.

20. For at least the past one and a half years there has been considerable discord among the administration, faculty, and students at the School, manifested by the resignation of over half the faculty, the dismantling of the student-faculty council by defendant Kohn, and racial antagonism.

21. Prior to their discharges and following the resignation of a black counselor at the School in January, 1978, each of the five plaintiffs had at various times discussed with defendant Kohn, Director of the School, the problems and tensions existing at the School and suggestions for how the Director and the staff could resolve these problems. The plaintiffs believed it was their professional responsibility, as well as an expression of their concern about the School and the students, to bring these matters to the Director's attention.

22. Despite their good faith attempts to bring these problems to the attention of defendant Kohn on numerous occasions, Ms. Kohn was not receptive to their concerns and generally dismissed and ridiculed their concerns.

23. On May 22, 1978, the plaintiffs delivered a letter to defendant Schlesinger, chairman of the Board, and to a number of the members of the Board, summarizing their concerns and their criticisms of defendant Kohn, and requesting that Ms. Kohn resign (see Exhibit A). That same day the plaintiffs delivered a virtually identical letter to defendant Kohn.

24. The following day, May 23, 1978, the plaintiffs orally informed a number of the Board members that they would provide additional details to substantiate their criticisms.

25. Upon information and belief, on May 23, 1978, the defendant members of the Board of Directors, at their regularly scheduled meeting, refused to conduct any investigation or further inquiry into the matters raised by the plaintiffs, and voted to give defendant Kohn full support and confidence.

26. On or about June 6, 1978, the plaintiffs submitted to the Board of Directors a detailed affidavit fully explicating their criticisms of defendant Kohn. (Exhibit B).

27. On or about June 5, 1978, a number of students at the School picketed defendant Schlesinger's house to protest conditions at the School and to request defendant Kohn's resignation.

28. On or about June 6, 1978, defendant Kohn at a staff meeting directed all staff members to tell the students who had

picketed and all other students that defendant Schlesinger had decreed that picketing constituted a disturbance in the neighborhood, that creating a disturbance in the neighborhood was against the policy of the Board, and that consequently, any student who picketed the school would be suspended immediately.

29. On or about June 6, 1978, each of the plaintiffs who was responsible for counseling students who had participated in said picketing informed said students of the statements of defendant Schlesinger, as instructed by defendant Kohn.

30. On or about June 8, 1978, the plaintiffs had a meeting with defendant Kohn in which they informed her that two of them had spoken with a lawyer and, based on the lawyer's advice, believed that the order prohibiting the students from picketing was unconstitutional and that they might be subject to civil liability if they instructed the students as ordered by defendant Kohn. The plaintiffs further stated to her that consequently, if asked by students as to whether said prohibition was constitutional, they would reply that it was their belief that it was not constitutional.

31. Later that day, June 8, 1978, defendant Kohn called each plaintiff into her office individually and ordered them to continue to tell students that defendant Schlesinger prohibited any picketing and that any student who picketed would be suspended immediately. She further ordered the plaintiffs not to tell students that they believed the prohibition against picketing to be unconstitutional, if asked, or else she would be forced to take "appropriate action."

32. On or about June 10, 1978, plaintiff Dawn Fonseca received a letter from defendant Schlesinger, terminating her employment at the School, in that he stated that he would not allow her to withdraw her previous tender of resignation. (See Exhibit C).

33. On or about June 15, 1978, a letter to the editor appeared in the Brookline Chronicle, signed by the plaintiffs, in

response to an article in said paper a week earlier reporting certain statements of several defendant Board members regarding events at the School. The letter of the plaintiffs was an attempt to correct certain inaccurate or untrue statements in the previous article, including statements about the circumstances surrounding the prohibition of picketing by students. In said letter, the plaintiffs stated, in part, that they believed the actions of defendants Kohn and Schlesinger, in ordering the plaintiffs to participate in unconstitutional and illegal actions was a violation of the plaintiffs' right to freedom of speech under the First Amendment. (See Exhibit D).

34. Also on June 15, 1978, the plaintiffs delivered to defendant Schlesinger a letter stating in part that they had contacted and were in the process of joining a labor organization for the purposes of representation and collective bargaining. (See Exhibit E). The plaintiffs also sent copies of said letter to defendant Kohn and to each member of the Board.

35. Upon information and belief, defendant Kohn consulted with defendant Schlesinger with regard to the termination of the plaintiffs prior to speaking with the plaintiffs on the morning of June 16, 1978.

36. On the morning of June 16, 1978, defendant Kohn called plaintiffs Klug, Anderson, Stein, and Tilden into her office separately and informed each of them that their employment at the School was terminated, effectively immediately. She orally informed each of them that the reason for their discharge was insubordination and disruption of the School's program.

37. Despite their repeated requests, the plaintiffs have received no written notice to date specifying the grounds for their discharges, nor an opportunity for a hearing before a fair and impartial body in which they could be represented by counsel and could examine the charges against them and present evidence in their own behalf.

38. The plaintiffs were not terminated for just cause, but due to their actions which were protected activities under the First Amendment to the United States Constitution and under the Massachusetts Labor Relations Act, Mass. General Laws chapter 151A.

39. Upon information and belief, since the plaintiffs' discharges, the defendants have placed or cause to be placed on the personnel records of each plaintiff statements that each of the plaintiffs was terminated due to his or her insubordination and disruption of the School's program, or the defendants will make such statements to prospective employers of the plaintiffs who seek references for the plaintiffs. Such allegations have placed or will place a stigma on the employment records of the plaintiffs and will prejudice and hinder their future employment prospects.

40. On or about July 7, 1978, the plaintiffs, through their attorney, requested by a letter to defendant Schlesinger and each of the other individual defendants that the plaintiffs be reinstated immediately and given full back pay, and requested written notice of the grounds for the discharges and the convening of an impartial grievance committee to conduct a full hearing in this matter. (Exhibit F).

41. Upon information and belief, on or about July 13, 1978, defendant Schlesinger appointed three of the defendant members of the Board of Directors as a grievance committee in this matter — Edward Zarsky, Joseph Gartner, and Rita Hamberg.

42. On or about July 20, 1978, the plaintiffs, through their attorney, notified defendant Schlesinger by letter that this grievance committee was not a fair, impartial, and unbiased body, in that several of its members had in the past expressed opposition to the plaintiffs and prejudgment of the issues in dispute. In said letter they again requested written notice of the charges against them and a statement as to the procedure to be used by any grievance committee. (See Exhibit G).

43. Neither the plaintiffs nor their attorney has received any oral or written response to either of their letters.

44. The plaintiffs have exhausted all available administrative remedies.

45. Upon information and belief, the defendants have started advertising for and hiring new staff to replace the plaintiffs.

First Claim

46. The defendants' actions in terminating the plaintiffs' employment have violated their rights to freedom of speech, contrary to the guarantees of the First, Fifth, and Fourteenth Amendments to the United States Constitution, in that plaintiffs were discharged for the legitimate exercise of their rights to freedom of speech. Said violations were wilful and malicious.

Second Claim

47. Plaintiffs have an entitlement to the position from which they were discharged, creating a property and liberty interest in their positions protected by the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

48. Said discharges from employment without prior notice, written statements of the grounds for the discharges, and a full and fair hearing violated these rights.

Third Claim

49. The plaintiffs' personnel records carry the stigma of defendants' false allegations and thereby prejudice their future employment, in violation of the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Request for Relief

WHEREFORE, the plaintiffs request this Court to enter a judgment as follows:

1) A temporary restraining order directing the immediate reinstatement of all plaintiffs with full back pay;

2) A preliminary injunction directing the reinstatement of the plaintiffs with full back pay pending a final determination of this action;

3) A permanent injunction against the acts complained of in this complaint;

4) A judgment for full back pay plus interest for each plaintiff, from the date of each plaintiff's discharge;

5) An award of compensatory and punitive damages for each plaintiff in the amount of $50,000.00, to be jointly and severally assessed against the defendants;

6) An order directing the defendants to remove all false allegations from all records and enjoining the defendants from making similar allegations in any form to any person;

7) A declaratory judgment that the acts of the defendant complained of were illegal;

8) A declaratory judgment that plaintiffs cannot be terminated for the proper exercise of their First Amendment rights.

9) A declaratory judgment that the plaintiffs may not be discharged without prior notice and a prior appropriate hearing consonant with the guarantees of due process and equal protection.

10) An award of reasonable attorney's fees and the costs of bringing this action;

11) Such other and further relief as this Court deems just and proper.

By their attorney,

Kurt M. Pressman
Goldstein & Pressman
678 Massachusetts Ave.
Cambridge, MA 02139
Tel. 492-8473

We, Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca, hereby certify that we, each for him or her self, have read the foregoing complaint and that it is true and accurate to the best of my knowledge, except for those statements made upon information and belief, and as to those they are true to the best of our information and belief.

Signed and sworn to under the pains and penalties of perjury this 1st day of August, 1978.

s/WAYNE KLUG
Wayne Klug

s/WILLIAM TILDEN
William Tilden

s/CAROLYN ANDERSON
Carolyn Anderson

s/DAWN FONSECA
Dawn Fonseca

s/PAUL STEIN
Paul Stein

Then personally appeared the above-named Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca, and acknowledged that the foregoing instrument was their free act and deed, each for himself or herself, before me this ____ day of August, 1978.

ILLEGIBLE

Notary Public
My commission expires:

EXHIBIT A

MAY 22, 1978

Dear Board of Directors,

We met to talk about the school's problems as we see them.

The school's ability to provide services has been seriously hindered and, in some cases, halted altogether. Students mistrust the counselling and resist classroom instruction. The school is not able to offer them meaningful alternatives to the negative peer group pressure to abuse drugs. The students are angry and demoralized. Attrition is absurdly high. All the staff agrees the students are not being served.

The staff also agrees that its own fragmentation has been a source of these problems. Attempts to deal with that fragmentation have failed repeatedly. We believe that not only has the Director, in various ways, undermined these attempts, but that the fragmentation itself has been caused by the failure of Sandy Kohn's direction.

As we see it, those failures include the following:

1- The Director's inability to administer the program; specifically, her inability to anticipate and effectively deal with problems before they reach crisis proportions; her indecisiveness; and her inability to exercise authority.

2- The Director's undermining of staff effectiveness; specifically, undermining individuals; preventing cohesiveness; and offering inconsistent supervision and discipline of staff members.

3- The Director's inappropriate behavior toward, and inconsistent discipline of, students.

4- The Director's insensitivity to issues of race.

5- And in general, a variety of other inappropriate, disrespectful, and unprofessional behaviors.

All of these matters have been discussed with the Director in more specific detail by some or all of us, to no avail. This compels us to the unpleasant but undeniable conclusion that the only prospect for the recovery of the New Perspectives School program lies in the Director's immediate resignation.

We have respectfully requested that Ms. Kohn resign as Director.

Signed,
s/Dawn Fonseca
s/Paul Stein
s/William Tilden
s/Wayne Klug
s/Carolyn Anderson
New Perspective School
staff members

EXHIBIT B

AFFIDAVIT
SUBMITTED TO THE BOARD OF DIRECTORS OF NEW PERSPECTIVES SCHOOL, INC.
by

Carolyn Anderson,
Dawn Fonseca,
Wayne Klug,
Paul Stein,
and William Tilden,
Counselors and Teachers at
New Perspectives School, Inc.

A variety of reasons compel us to request that the Board remove Ms. Sandra Kohn as director of New Perspectives School. These reasons may be grouped into six main categories, which we now propose to discuss in detail.

I. THE DIRECTOR'S INABILITY TO ADMINISTER THE PROGRAM.

A. *Her inability to anticipate and effectively deal with problems before they reach crisis proportions.* Ms. Kohn's direction is characterized by a lack of forethought or long-range planning. This has often given rise to problems which might otherwise have been avoided. Once presented with these problems, furthermore, Ms. Kohn's incapacity to recognize and effectively respond to them has thrown the school into crisis after crisis. We cite the following examples:

1) Ms. Kohn's hiring reflects no long-range planning for the school's future staffing needs, especially with respect to the remedial and math components. To complicate this problem, Ms. Kohn's intake decisions have produced many more remedial students than the staff is properly equipped to handle. She has withheld information and discouraged discussions pertaining to staffing needs. For example, staff discussions concerning the

growth of the math department and the feasibility of seeking an MSW were terminated and called inappropriate by her.

2) With regard to students' specific needs, in April Ms. Kohn declared "We've ignored the drug issue so far this year. I'm afraid we've been rather neglectful of a major part of our program."

3) Ms. Kohn has formulated no guidelines for dealing with theft by students despite repeated appeals from staff members and repeated instances of stealing.

4) In her approval of the plan for a student senate, Ms. Kohn ignored the need for explicit written guidelines confining students strictly to non-administrative matters. Consequently, students became confrontative and angry about her attempt to alter the senate by-laws retroactively, in what they perceived as an arbitrary limitation. (See point 17.)

5) Ms. Kohn identified, but subsequently refused to deal with, the conflict experienced by several of her counselees between her roles as their counselor and director of the school. To a worker from another agency Ms. Kohn related this problem with respect to one of her counselees, and to the staff as a whole with respect to another when she said "It is extremely difficult for (one student) that her counselor is also the director, and it's very difficult for me too."

6) Despite the urging of staff members, Ms. Kohn refused to confront and provide answers to questions raised by students. In one case, overriding the suggestion of staff members that one student was acting as a spokesperson for others, Ms. Kohn portrayed that student as the only interested party and dismissed her concerns as those of a borderline personality.

7) When Ms. Kohn finally convened a special meeting to discuss staff discontents, as reflected in Mr. McLean's

letter, she undermined the second and third follow-up meetings by stating that she thought they would be "unproductive" and that "I do not want to be here." By doing so, she abdicated her responsibility to investigate and resolve these issues.

8) Ms. Kohn permitted Mr. McLean to receive a letter from the Board of Directors concerning his performance without his knowledge that she intended to bring this issue to their attention, without his foreknowledge that such a letter would be sent to him, and without any formal disciplinary actions having previously been taken. This precipitated Mr. McLean's resignation.

9) Ms. Kohn neglected to fully apprise Doctor Michael Good of the seriousness of her complaints about his performance such that he responded with shock to his termination as of June 30. Consequently, he resigned immediately, and the staff was left without a psychiatric consultant for three weeks.

10) Ms. Kohn refused to grant Ms. Fonseca a meeting with herself and Mr. Tilden for the purpose of clarifying a remark she made to Mr. Tilden maligning Ms. Fonseca. After Ms. Fonseca had resigned, Ms. Kohn finally summoned Ms. Fonseca and Mr. Tilden to her office, became agitated, and denounced Mr. Tilden as a liar.

11) At one staff meeting the question arose as to whether certain staff members had been talking behind Mr. Stein's back. During this sensitive discussion, Ms. Kohn abrubtly left the room for five minutes, re-entered noisily, further interrupting the discussion with remarks about students who had arrived in the building, changed the topic to the ability of students to split the staff, claimed ignorance of the whole matter being discussed, cut-off the discussion, and then dismissed the staff meeting. The issue was never resolved.

12) When at one meeting the staff pressed for Ms.

Kohn's recognition of issues raised in Mr. McLean's resignation letter — issues of racism, disrespect, deceit, favoritism — Ms. Kohn responded by saying "There's no way you can run a program and deal with all these things."

13) Ms. Kohn disregarded the seriousness and made no attempt to deal with issues raised in Mr. McLean's resignation letter until months later when one staff member wrote a letter to the Board concerning these issues and four other staff attended the April Board meeting.

14) Ms. Kohn has repeatedly acknowledged fragmentation among the staff. At three separate meetings in particular, she remarked that "the staff is definitely split," "the staff is split and it has been this way for over a year," and the problems arising from the split were a "deja vu" that recurred periodically.

15) Ms. Kohn has failed to systematically document long-range data concerning counseling attendance, class attrition, and total attrition rates. This lack of records prevents any analysis, study, and resolution of programmatic problems, such as the presently high attrition rate, as well as any standardized means of assessing whether services are successfully being provided.

B. *Her indecisiveness and inability to exercise authority.* Ms. Kohn's direction is further characterized by a style in which crises derive from emotionally-based, then arbitrarily reversed, decisions and directives. The director's incapacity to exercise the authority of her position compounds this problem.

16) Despite her usual insistence that the staff is split, on at least one occasion Ms. Kohn denied this and implied that the notion had been invented by another staff member. In a March staff meeting, she challenged Mr. Tilden to defend his view that the staff was split.

17) For more than a year, Ms. Kohn declared that under no conditions would she entertain the possibility of a student council. In the fall, Ms. Kohn discouraged Ms. Fonseca from researching how psychiatric institutions use self-government as a therapeutic tool, and in other ways made it clear to the staff that a student council was "out of the question". Neither this position nor her subsequent reversal reflected any coherent theoretical motivation compelling her to principled action, but rather appeared to be spontaneous reactions, variously, to student, staff, and Board pressures.

Her indecisive attitude toward the council has subsequently surfaced as a confused vision of what the student senate should be — forcing her to limit the scope of the senate as a reaction to student requests which she felt were intolerable. Rather than simply denying permission, she labelled the student requests as inappropriate: "The senate should not deal with administrative matters," she said.

But this only worsened the problem. Because this statement also lacked definition, students didn't know what "administrative matters" meant. They were angered by the randomness of what was forbidden and permitted. Why, for instance, were financial matters considered administrative, while fund-raising was not? Why was *advice* on hiring considered administrative, while advice on curriculum and program development was not?

The upshot is that the growth of the senate has been jeopardized and student mistrust and hostility toward both Ms. Kohn and the staff has been hightened.

18) In January Ms. Kohn delegated to the staff the responsibility to develop a procedure to hire new staff members. The staff voted on and approved a process which was presented to Ms. Kohn for implementation. Rather than rejecting the proposal outright, however, she

attached an addendum which devitalized the process. In either case, her response reflected a distrust of part, if not all, of the staff.

When Mr. Stein and Mr. Tilden then requested that they be excused from the whole interviewing process, Ms. Kohn consented. Later she revoked that consent. Later still, she re-gave consent by disposing of the process entirely and replacing it with a new one of her own which effectively allowed anyone who so wished to be excused. The new procedure, subsequently, was utilized in hiring Mr. Gary Jones but not in hiring Dr. Mogul.

Ms. Kohn's private reaction to Mr. Stein was to censure him for discussing the issue of hiring in the first place — even though she herself had directed the staff to address the problem — and to upbraid him for "not doing the job you were hired for". But when Mr. Stein asked whether she was criticizing his teaching or counseling, she said no.

19) Ms. Kohn has chaired hours of staff meetings which were wasted in pointless discussions. Rather than simply giving directives with the reasonable expectation that the staff will implement them, Ms. Kohn uses ostensibly "open" staff discussions as a vehicle by which staff decisions may be steered into rubber-stamping decisions already made by her. When in the course of such discussions, staff opinion has honestly diverged from hers, she has abrubtly terminated the discussion and announced that hers is the decision which will be implemented. At such times she has been unable to answer staff questions as to why she had conducted these discussions at all. The following three incidents will serve as examples:

a) Ms. Kohn opened a discussion of the student senate by calling for a report from the staff liaison members. Ms. McCleary and Mr. Stein reported that students had requested the senate be permitted to read resumes and meet candidates for the counsel-

ing position. The liaison committee had recommended this in turn to Ms. Kohn. Although Ms. Kohn was resistant to this idea, she encouraged the staff to discuss how it should respond to the students. Citing the advantages of watching students interact with potential candidates, Ms. Fonseca and Mr. Klug suggested that the student senate requests be granted, so long as its role remain strictly advisory.

Ms. Kohn became adamantly opposed to the idea. Ms. McCleary and Mr. Stein pointed out that Ms. Kohn had already refused the students' request. Mr. Tilden then asked if, as a result of this discussion, a staff decision to the contrary would have changed her mind. Ms. Kohn said no. When Mr. Stein asked why the discussion was held, Ms. Kohn did not answer.

b) Ms. Kohn opened another staff discussion about graduation plans. After a report from several staff members concerning how angry and upset the students had become with the decision to hold graduation in the building (due to limited seating capacity), Ms. Evans and Ms. Kohn remarked that that had been a staff decision. Correcting them, Ms. Fonseca, Ms. Anderson, and Mr. Klug pointed out that the entire staff had never made that decision.

Ms. Kohn suggested the students be told it was a staff decision anyway. Although Mr. Klug said he would have no difficulty abiding by any decisions concerning graduation on Ms. Kohn's part, he did not want such a controversial decision attributed to him when in fact no such staff decision had been made.

Ms. Kohn proposed that the staff tell students it had been a majority opinion, but Ms. Fonseca remarked that Ms. Kohn's proposal would set a

dangerous precedent in that the staff did not know if such was actually the case. Ms. Evans suggested that the staff take a vote to determine if a majority did in fact exist, but Mr. Tilden asked if a majority vote to the contrary would change Ms. Kohn's mind. Ms. Kohn said no. Mr. Stein asked, as before, why the discussion was held. Ms. Kohn did not answer.

c) The staff engaged in a long, heated discussion about what disciplinary measures should be taken against a student who had threatened a staff member. Staff later learned that 766 guidelines limited what action could be taken. Had Ms. Kohn originally informed the staff of these restrictions, the protracted and pointless argument could have been avoided.

20) Ms. Kohn informed the staff that the student involved in point #53 was henceforth out of the program. A week later, she informed the staff that the student would be returning.

21) Ms. Kohn pre-empted one staff meeting's agenda so the staff could discuss what she said was a crucial matter. She then turned to Mr. Richmond, encouraging him to speak. Mr. Richmond confronted Mr. McLean for having spoken privately to his (Mr. Richmond's) black counselee and claimed this had caused a deterioration in that counseling relationship. Mr. Richmond demanded to know why Mr. McLean had been speaking to the student and what he had been speaking about.

A long, heated discussion ensued in which Mr. McLean was indicted for undermining the counseling process and encouraging a student to split staff members. Mr. McLean left the meeting feeling angry and unjustly attacked by many staff members and the director.

A few weeks later, Ms. Kohn admitted that she had previous to that discussion given Mr. McLean permission

to speak regularly with black students who were not his counselees. However, at that time, she refused to discuss it any further. On a separate occasion, she also claimed that it was inappropriate to have brought before the whole staff an issue concerning only two staff members.

22) Ms. Kohn said she had difficulty denying student requests for loans. She needed the Board to make a policy forbidding loans by which she and the staff could gain the strength to refuse such requests, she said. Some staff pointed out that this policy would be superfluous, questioning staff inability to set such limits.

23) After the school was broken into last fall, Ms. Kohn gave to police the names of several students whom she informed them were angry at the school. In staff meeting later that day, a decision was made to tell the students involved that their names had been given to the police. Ms. Kohn announced that she would carry out this duty. However, Ms. Kohn never did tell the students. One student found out through his counselor, and as a result an angry and ugly scene occurred at the next all-school meeting when students accused Ms. Kohn not only of having implicated them but of having done so behind their backs.

24) In preparing for the January graduation, Ms. Kohn decided to deny permission to speak to a particular student who she had reason to believe would otherwise make some angry remarks. At graduation, when asked, she spontaneously reversed herself and allowed the student to speak. The speech was indeed angry; the Chairman of the Board was obliged to step in and cut the student short, as Ms. Kohn made no attempt to control him. The speech had ruined graduation for many students, their families, and staff.

25) In anticipation of another angry speech which she could not control, for some time Ms. Kohn considered the

possibility of not holding a spring graduation ceremony at all. In a discussion concerning prospects for the June ceremony, Ms. Kohn declared "I cannot control graduation. If someone else wants to do it, fine. But I can't take (a certain student) by the hand and tell him to sit down."

26) In January, Ms. Kohn took no disciplinary action about Mr. McLean's lateness. Instead, she went to the Board and asked it to act.

27) After requiring the staff to convene a special meeting to deal with problems in the program, Ms. Kohn subsequently said that she did not "have the strength to say no" to that staff forum, and said that she would have to sit through it.

28) After a brief and unresolved discussion about racism in the program, Ms. Kohn assigned to another, black staff member the responsibility of continuing the discussion at another date. "Dawn, you should bring this up again when you think it's appropriate." Ms. Fonseca later told Ms. Kohn that she did not think she should take the burden of that responsibility alone, that everyone must show a willingness to confront the subject, and that that willingness had to come from the initiative of the director. Subsequently, the issue was not dealt with again.

29) At the end of last summer, Ms. Kohn complained to Mr. Harmon that he had not adequately confronted racism on the staff. But six months later, Ms. Kohn did not support Mr. McLean's effort to confront racism.

30) After she had fired Dr. Good, Ms. Kohn did not want to meet with him for his last appointment. She agreed to do so only after several staff members convinced her it would lack professionalism to avoid this last meeting.

31) Ms. Kohn requested that Ms. Anderson speak to Mr. McLean about his lateness problem, but later, when

she discovered that Ms. Anderson had done so, blasted her for having talked about Ms. Kohn behind her back.

II. The Director's Undermining of Staff Effectiveness.

A. *Her undermining of individuals on the staff.* Ms. Kohn frequently makes off-handed remarks to individual staff members which negate or dismiss their contribution to the program. Worse than this, Ms. Kohn has divided and prejudiced staff members against each other by talking about them behind their backs. These have not been rational comments leading to programmatic solutions of particular problems, but rather have been her subjective criticism of staff members' personal lives or attacks on their integrity.

32) Calling Mr. Stein into her office in response to his earlier-expressed concerns about the hiring procedure, Ms. Kohn declared "You wouldn't have gotten hired if it wasn't for this process." She further accused him of an inability to separate himself from his students, claiming that he was acting exactly like (one student) "who quit her job because they wouldn't make her manager," and went on to assert that he was "falling apart", especially in the last ten days.

33) On one occasion in January, Ms. Kohn disregarded a suggestion of Mr. Tilden's by claiming that he was "middle class".

34) In one March staff meeting, in comparing the different investments of staff members into the various components of the program, Ms. Kohn asked rhetorically "Does Wayne care about the counseling? No."

35) In the incident concerning Mr. McLean, Mr. Richmond, and Mr. Richmond's counselee (cited in point #21), Ms. Kohn publically chastised Mr. McLean for his inappropriate meeting with another staff member's counselee and for his alleged naivete for believing the stu-

dent's desire to meet with him reflected a racial need. As we noted earlier, Ms. Kohn later admitted that she had given Mr. McLean permission to see black students in this fashion.

36) Ms. Kohn has made the following comments to and about a variety of staff and Board members as listed below:

a) At various times Ms. Kohn said to Mr. Tilden about *Ms. Fonseca*: "She is more middle class than the rest of them."

—"She's too middle class to be black."

—"I could never give her hard-core black kids; Dawn is just like (one black student's) mother."

Mr. Harmon: "The reason he couldn't deal with (one black student) was that he hated his own blackness."

—"He had trouble with fat black women."

Ms. Anderson: "Stay away from her; she should leave . . . She's been my biggest disappointment, I've tried so hard with her . . . I would fire her if I could."

Mr. Klug: "I have a hard time dealing with his naivete."

Ms. Meshon: "She's unable to handle certain kids."

Mr. Richmond: "He needs help . . . I thought I was going to be able to depend on him more."

Mr. McLean: "Keep an eye on Cal . . . did you notice how he spoke up too fast? . . . I'm not sure about keeping him on."

—"Why has a 37 year-old man been out of work for a year and a half with a wife and kids?"

b) At various times Ms. Kohn said to Mr. Klug about

Ms. Evans: "She's weak and needs a strong man to support her."

Ms. Anderson: "She needs to feel she has authority over someone, so I'm going to let her be head of maintenance."
Mr. Richmond: "He feels just terrible about his teaching. He's weak and he needs your support, Wayne."
Mr. McLean: "He's an angry black man who came out of the black thing in the sixties."
(one Board member): "He's very angry. You know he's married to a white woman . . . he's got problems with his blackness."
Mr. Behn: "Dick and I worked very closely together in the beginning, but then he went cuckoo and lost touch with reality."
Mr. Atherton: "He's a racist and an anti-semite."
Mr. Hogarth: "You know he has a terrible drinking problem and this school is all he's got."
Ms. Howe: "The way she dresses and carries herself is a come-on to students."

c) At various times Ms. Kohn said to Mr. Stein about
Ms. Evans: "Laura is weak . . . she can't handle the authority by herself."
Mr. Harmon: "Jesse is a middle class black man."
(one Board member): "He has his own problems with his blackness."
Mr. Tilden: "I called him a racist and I meant it."
Mr. Atherton: "He is a racist and an anti-semite."

d) At various times Ms. Kohn said to Ms. Anderson about
Mr. Klug: "There's something wrong with him, being on a CETA job at his age."
—"What should I do about it? He's going to adopt (one female student)."
Mr. Behn: "He's got a real problem and you should talk to him."

B. *Her Undermining of Staff Cohesiveness.* In contrast to specific comments made about individuals behind their backs, Ms. Kohn frequently makes generalized criticisms of problems or deficiencies in the staff. Her refusal to specify who or what she means heightens mutual mistrust and suspicions among the staff.

37) To various staff meetings Ms. Kohn has declared

a) "There is definitely racism in this staff."

b) "If people need personal therapy, they should go outside for it."

c) "There's too much talking going on behind my back . . . there are trysts going on all over the place."

d) "You don't know nine-tenths of what goes on in this program."

e) "I have indications that people have repeated what goes on here outside of these meetings . . . (but) let's table that."

f) "I don't trust everyone in this program equally . . . personally or professionally."

g) "I ask your opinions only out of courtesy."

h) "Staff people are maligning me."

38) To various individual staff members Ms. Kohn has made similar comments.

a) In response to Mr. McLean's accusation that she spoke vulgarly to students, Ms. Kohn told Mr. Klug: "Everybody on the staff is vulgar about students."

b) To Mr. Stein she insisted that staff members were for months "conspiring to polarize the staff" and were "directing students". She added that staff members "had problems with authority".

c) To Ms. Anderson she said "Staff people are maligning me."

d) To Mr. Klug Ms. Kohn stated "The staff have a problem with authority. Some people can't take no for an answer. They're acting just like students."

e) To Ms. Fonseca Ms. Kohn said "Some staff members are not sharing everything about their counselees with me."

f) During the second special staff meeting in May, called to discuss problems in the school, Ms. Kohn said under her breath "I can't wait to get out of here . . . only — minutes left."

C. *Her Inconsistent Supervision and Discipline of Staff.* Ms. Kohn's discipline of staff members is inequitable and her supervision is uneven, lacking standard methods of evaluation of both staff members and the program as a whole.

39) In response to Mr. Hogarth's lateness, Ms. Kohn took no action. In response to Mr. McLean's lateness problems, however, Ms. Kohn went directly to the Board.

40) At different times Mr. Klug, Ms. Fonseca, and Mr. McLean had complained to Ms. Kohn about Ms. Evans' disrespectful and confrontative behavior toward them. Ms. Kohn did not follow up these complaints with any action.

41) In one session as quoted above, Ms. Kohn told Mr. Stein "You're not doing the job you were hired for." When Mr. Stein questioned her about this in the following supervision session, she replied "I never said you weren't doing your job."

42) Ms. Kohn has given school funds to pay for graduate courses to certain staff members, while withholding them from others.

43) On one occasion, Ms. Kohn failed to inform Ms. Anderson of an important development concerning her counselee, that student's mother, Mr. Harmon, and Ms. Kohn. For a year after that, Ms. Kohn was offered only intermittent supervision to Ms. Anderson, sometimes allowing weeks to pass by without holding a session. Only upon Ms. Anderson's insistence has Ms. Kohn conducted supervision of her with any regularity.

44) On several occasions, Ms. Kohn has scheduled appointments during Ms. Anderson's, Mr. Klug's, and Mr. Tilden's weekly supervision time without previously informing them.

45) To date, Ms. Kohn has failed to give Ms. Anderson her evaluation in spite of the fact that it is a year since the evaluation policy was instituted.

46) Ms. Kohn offers no detailed, systematic evaluation of each teacher's courses and teaching styles — in terms of curriculum, course goals, student interest, and overall learning — in order to aid and encourage teachers with a critical eye. At one point, Ms. Anderson confronted Ms. Kohn about this, and her response was to say that people on the staff could not deal with critical evaluation.

47) Ms. Kohn's slack in academic supervision stands in striking contrast to the extensive psychiatric supervision. This is reflected in an attitude that discourages outreach to other alternative schools while encouraging only drug— and counseling-related contacts. A year ago, to dramatize her opposition to such outreach, she pulled down a document by the National Coalition of Alternative Schools from the bulletin board where it had been posted and, in front of the whole staff, angrily ripped it up.

48) In signing up her counselees for classes, Ms. Kohn consistently has overbooked courses in disregard of the limits set by her and the individual teachers as to the number of students who may enroll in classes.

49) Ms. Kohn had been informed by Mr. McLean of a difficulty he had experienced involving Mr. Tilden, which concerned the underlying racial dynamics between Mr. Tilden and a student. Mr. McLean and Mr. Tilden had later resolved this conflict between themselves. Ms. Kohn did not mention the incident to Mr. Tilden until months later after Mr. McLean had left

and she herself had been accused of racism, and then only did so vindictively and in a manner not clinically justified.

III. The Director's Inappropriate Behavior Toward, And Inconsistent Discipline Of, Students.

Ms. Kohn's behavior toward students, both personally and through instructions to counselors, reflects, in conjunction with other subjective influences, her various sympathies and antipathies toward the students; it reflects neither a coherent policy on limits and discipline, nor a sense of what is appropriate for students to hear or know. In contrast to periodic appeals for limits which apply across the board, the notion that the school offers an "individualized program" appears to exist more as a smokescreen for Ms. Kohn's inconsistencies than as a theoretical basis for dealing with students. Ms. Kohn's incapacity as an administrator is further evidenced by her fear, in many cases, of meeting with students alone.

50) On the afternoon of graduation day last summer, Ms. Kohn called the sole graduate into full staff meeting and threatened to cancel the ceremony if ex-staff member Sheila Rendell-Baker attended. The student left the meeting crying. Ms. Kohn declared "It's important to keep (that student) sad."

51) As opposed to encouraging independence and maturity, Ms. Kohn's counseling is characterized by a consistent effort to create in her counselees an ongoing passive dependence. When in one recent staff meeting she described her relations with a counselee, psychiatric consultant Dr. Good warned Ms. Kohn: "You're mother-henning her."

In another incident prior to a school vacation, Ms. Kohn urged a second counselee to schedule an appointment withg her during that week. The student explained that her work schedule would prevent her from seeing Ms. Kohn, but offered to call her if a crisis came up. "But your whole life is a crisis," Ms. Kohn replied.

52) Ms. Kohn once frightened a counselee by insisting upon her own dramatically incorrect perception of events involving that student. This counselee had left the room during an all-school meeting, and upon returning had asked to be informed of what she had missed. Several minutes later, she was asked to leave the building on suspicion of being stoned. The next day, the student confronted Ms. Kohn, denying that she had been stoned. Ms. Kohn admitted to that possibility, she later explained to Mr. Klug, but cited the student's inappropriate behavior at the meeting as the real cause for the expulsion.

As partial evidence for this claim, Ms. Kohn insisted upon her own erroneous belief that the student had not at any point left the room the night before, and that by suggesting anything to the contrary, the student was demonstrating that she was indeed out of touch with reality. In response to this, the student made the rounds of staff and other students, seeking and gaining corroboration for her own memory of the events. Later still, as Ms. Kohn further explained to Mr. Klug, the student demanded an apology from her, and accused her of "trying to tell me I was crazy."

53) Ms. Kohn badly mismanaged a violent scene involving a potentially suicidal student. Following upon the incident cited in point #52, the same student became emotional and angry during a counseling appointment with Ms. Kohn, and ended the meeting by putting her fist through Ms. Kohn's office window. Ms. Kohn expelled her from the building without attempting to provide medical care. She later admitted to Mr. Klug "I know she was bleeding, Wayne, because I saw those drops of blood." Neither did she think later that night to check up on this counselee whom she herself insists is self-destructive. Ms. Kohn admitted to Mr. Klug "It wouldn't have occurred to me to call her. I'm glad you called me up and suggested it."

Ms. Kohn ultimately did call the student, later explaining to Mr. Klug that she had initially been reluctant to do so "because I'm afraid of her violence". She added that she had failed to bring this counselee to a recognition of her feelings, in part, because "I'm absolutely petrified with her".

54) In an earlier incident involving the same student described in point #53, Ms. Kohn permitted to leave the building a counselee who had just taken a large quantity of penicillin capsules and had earlier that day cut her wrists. Ms. Kohn did not prevent the student from leaving, nor insist upon taking her to a hospital, until another staff member, Ms. McCleary, urged her to do so.

55) On hand to clean up the glass broken in the incident cited in point #53, Mr. Klug advised Ms. Kohn not to allow her next counselee to enter the office and observe the mess. Nevertheless, Ms. Kohn called her into the office, and did so — since she herself had been shaken by the incident — only to cancel the appointment. This second counselee, in turn, became upset by the sight and asked Ms. Kohn "How did your window get broken?" Unable to answer the question, Ms. Kohn's response was "Wayne's cleaning it up."

56) Ms. Kohn cricitized Mr. McLean in front of students. Answering questions about the charges made in Mr. McLean's resignation letter, Ms. Kohn at an all-school meeting denied that Mr. McLean had resigned for the reasons he had indicated. Rather he had left, she told the students, because of "personal problems".

57) Upon seeing (one black student) come into the school dressed expensively, Ms. Kohn asked him if he had stolen his clothes, she later told Ms. Fonseca.

58) As the justification for a disciplinary expulsion, Ms. Kohn consistently asserted that (one female student's) drug problem rendered her unable to function in a school

setting and warranted her enrollment in a residential drug treatment program. After her expulsion, however, and noting no difference in her behavior involving drugs, both Ms. Kohn and Ms. Evans, the student's counselor, attended a Core re-evaluation for this student, as a result of which she was placed in a regular public high school.

59) As noted in point #23, Ms. Kohn called the police after the building was broken into last fall. In response to a police inquiry as to whether there were students angry at the school, Ms. Kohn without consulting staff gave police the names of certain students. Not only did this action breach confidentiality, but her subjective judgment resulted in a violation of the trust these students had in the program to protect their interests, by unnecessarily exposing them to police investigations. From this incident, seemingly, dates the growing feeling among students that staff are somehow persecuting or conspiring against them. This was evidenced by the angry speech made during the January graduation by one of the students who had been named.

60) In one all-school meeting Ms. Kohn was confronted by a substantial number of students with charges of racism on the staff. During this discussion she declared "If you're asking me if there is racism on the staff in the program, the answer is definitely yes." This remark heightened the students' mistrust of the staff as a whole.

61) Ms. Kohn and the staff had made the decision not to read during an all-school meeting, and thereby give credence to, a letter some students had written about Ms. Kohn. During that meeting, however, Ms. Kohn handed one of her counselees the letter to be read aloud, causing an explosive confrontation.

62) In February, Ms. Kohn asked one graduate to leave the building; she did not make this request of another graduate who was present at the same time.

63) Ms. Kohn was informed by a staff member that (one black female student) had special remedial needs. In response to this appeal, Ms. Kohn replied "She has integrity and that will get her through life."

IV. The Director's Insensitivity To Issues Of Race.

Ms. Kohn has failed to confront the issues of race which underlie staff-staff, staff-student, and student-student dynamics — whether the context be in the classroom, in counseling, or in an informal setting. This insensitivity has generated an underlying negative tone concerning race and racism at the school.

64) Ms. Kohn has watched every black staff member resign from the program in anger. Not one has stayed for more than a year. In every case, furthermore, Ms. Kohn has been the target of that anger.

65) Ms. Kohn has made numerous statements about individual staff members which reflected an insensitivity to race. As has already been documented in point #36, she has referred to Ms. Fonseca, Mr. McLean, Mr. Harmon, and one Board member in this vein. As cited above, different individuals, in her view, have had problems with their blackness.

66) In discussing the difficulties that black students face at home, Ms. Kohn has on occasion referred to "the pathology of the black matriarchy".

67) As cited in point #28, Ms. Kohn delegated her responsibility to confront racism in the program to Ms. Fonseca. This reflected an insensitivity to Ms. Fonseca's precarious position as the only black staff member. Furthermore, when Ms. Fonseca expressed her discomfort with that role, Ms. Kohn never found time to bring up and approach the issue in staff. On one occasion, in fact, she said "We can't take school time to deal with this (racism and disrespect)."

68) Ms. Kohn refused to seriously entertain the notion that (a certain black student) might need a black counselor.

69) Ms. Kohn insisted that Ms. Fonseca and Mr. McLean be supervised one hour per week with respect to a minorities course they were to co-teach. Only in this case — one in which two black staff members were involved — was such close supervision demanded. Other teaching pairs — specifically Mr. Tilden and Ms. Ford, and Ms. Fonseca and Ms. Capuano — have co-taught courses and did not require such scrutiny.

70) As if to play down and justify the degree of racism on the staff at present, Ms. Kohn once claimed to Ms. Fonseca "If you think there is racism now, you should have been here before."

71) As cited in point #21, Ms. Kohn condoned a staff attack upon Mr. McLean for meeting informally with a black student and denied that the motivation for the meeting might have stemmed from the student's need for racial identification. Further, Ms. Kohn prevented a serious discussion of the pros and cons of such interactions in light of the program's counseling objectives.

72) On numerous occasions, Ms. Kohn has insisted that "I do not see color." To prove her point, she anecdotally tells of her friendship with an obese woman whose fatness, Ms. Kohn claims, she also does not "see". This comparison implies Ms. Kohn's perception of blackness as a malady or embarrassment best to be tactfully ignored. Ms. Kohn has also asserted that attention to racial dynamics in the students negates the seriousness of other adolescent problems and camouflages more pressing concerns. This response denies the special conflicts that black students must face concerning their cultural identity and sourse of self-esteem.

V. The Director's Inappropriate, Disrespectful, And Unprofessional Conduct.

Overall, Ms. Kohn displays behaviors grossly lacking in professionalism. These include breaches of confidentiality, random labelling of students, lying, and a lack of self-control.

A. *The Breach of Confidentiality.*

73) Ms. Kohn revealed to Ms. Fonseca information which Mr. Tilden had discussed with her in supervision. This information concerned conflicts Mr. Tilden had experienced with certain staff members and also facets of his personal upbringing.

74) Last summer, Ms. Kohn spoke freely (about one female student's) personal background in front of one of the tenants in the rear building.

75) Ms. Kohn allowed Ms. Fonseca and Mr. Richard Lee — who were at the time only candidates for positions at the school — to be parties to a confidential staff discussion of one student in the program.

76) As cited in points #23 and #59, Ms. Kohn released to police the names of students without the students' knowledge. This action violated various funding agencies' criteria which proscribe the release of information to law enforcement officials or agencies without the students' prior, informed consent.

B. *The Random Labelling of Students.* Ms. Kohn often uses psychological terminology to explain away student concerns as manifestations of behavioral problems.

77) At one all-school meeting, (one male student) had confronted her on a decision she had made and then after the meeting asked for her assistance on another matter. In a subsequent staff meeting, Ms. Kohn labelled him "schizophrenic".

78) Having been particularly outspoken and angry about the nature of student input at the school, another student was labelled "borderline" by Ms. Kohn. In a

subsequent staff meeting, the psychiatric consultant insisted that he did not see this student as borderline.

79) In another all-school meeting, (one female student) had angrily raised her concerns about the points cited by Mr. McLean in his letter of resignation. In a subsequent staff meeting, Ms. Kohn dismissed this confrontation as characteristic of a borderline personality.

C. *Her Abuse of Her Role As Staff Representative to the Board of Directors.* To the Board and to the staff, in turn, Ms. Kohn has presented as truth information that was either a misrepresentation or a lie.

80) With respect to Mr. McLean's lateness, one Board member questioned Ms. Kohn as to how she had dealt with lateness in the past. She replied that the "staff has not been late before". Mr. Hogarth had, in fact, been consistently late.

81) In answer to a Board member's question as to why the school was experiencing such a high attrition rate this term, Ms. Kohn replied that "the staff changed the absence policy". In fact, the absence policy had not been changed at all; only the lateness policy had been changed. Importantly, this policy had been instituted for the purpose of *reducing* attrition as well as lateness.

82) Although Ms. Kohn told the Board that approximately 45 students were matriculating at the school, there were at that point, in fact, only 34 students matriculating.

83) Ms. Kohn told the staff that the entire Board had been present at the meeting in which a decision had been made to send Mr. McLean a letter. Ms. Anderson, who had taken a telephone message from one Board member calling the school that night to say he could not attend, suggested that that Board member had been absent. Ms. Kohn denied this, stating "(That Board member) was there." In fact, that Board member, as well as others, had been absent.

84) Ms. Kohn told the staff that at its last general meeting the Board had made a decision not to institute a new policy on tuition money for staff members. When Mr. Stein, who had been present at that meeting, confronted Ms. Kohn on this statement, she declared that the decision in question had been made, rather, by a subcommittee of the Board.

D. *Her Presentation of False Information or Half-truths to Staff Members.*

85) Shortly after the psychiatric consultant had asserted that to his knowledge (one student) was not borderline, Ms. Kohn stated to the staff "(This student) is not a borderline, and I never thought he was." In fact, she had on a number of occasions referred to him as such.

86) Ms. Kohn claimed to Mr. Stein that, when the discussion first came up, no staff had objected to her decision to hold graduation in the building. In fact, at least three staff members had strongly objected.

87) Ms. Kohn lied to Ms. Fonseca either by telling her, on the one hand, that her remark "She's too middle class to be black" had been drawn out of context, or by telling her, on the other hand, that she had never made the remark at all.

88) Ms. Kohn told Mr. Klug that she did not know what Ms. Fonseca's resignation was about. The following day in staff meeting, Ms. Kohn revealed that she clearly understood the cause of Ms. Fonseca's resignation to stem from her mistrust of Ms. Kohn on issues of race.

89) In explaining an incident in which she had remained in an alcohol-serving restaurant in the presence of an under-age student, Ms. Kohn asserted to the staff that "Drinking with students had nothing to do with why Sheila Rendell-Baker was fired." It is a matter of fact, however, that Ms. Kohn reported to the Division of Employment Security that Ms. Rendell-Baker had been terminated for drinking with minors.

E. *Her Other Unprofessional Practices.*

90) Apart from hosting a perfunctory hour-long "parents' night" last fall, Ms. Kohn has consistently disregarded 766 regulations to the contrary and discouraged ongoing parental input into their children's education at New Perspectives. Ms. Kohn has repeatedly asserted that the parents are not interested, and has dismissed staff suggestions to the contrary by stating "It's the kids we're here to serve, not the parents."

91) Ms. Kohn's hiring and firing procedures have been brought into question on a number of occasions for displaying a lack of professionalism. For instance, she began interviewing for a new psychiatric consultant before Dr. Good had been informed of his termination.

92) Ms. Kohn has, at times, neglected to place advertisements in the paper for new staff openings, in violation of EEO guidelines.

93) Ms. Kohn has, at times, interviewed and presented to staff only one candidate to fill a position. This was the case for positions filled by Mr. Stein, Mr. McLean, and Mr. Jones.

94) Ms. Kohn created a situation which angered a student with a lie and caused a parent to call a staff member with concerns about racism. Ms. Kohn called a special staff meeting to discuss how students should be told about the resignation of three staff members, Ms. Fonseca, Ms. Evans, and Ms. McCleary. It was agreed that Ms. Fonseca would not discuss with the students her reasons for leaving, and, if asked, would respond that the question was inappropriate. When a staff member asked her if she would say that she was leaving to return to school, Ms. Fonseca replied that, since this was in fact not so, she was disinclined to lie.

The all-school meeting went as planned. After the meeting, however, a student approached Ms. Kohn and

asked her why Ms. Fonseca was leaving. As later reported by the student and corroborated by other students who witnessed the conversation, Ms. Kohn replied that she did not know why Ms. Fonseca was leaving because Ms. Fonseca had not told her.

The student later approached Ms. Fonseca, who was unaware of his earlier encounter with Ms. Kohn, and asked her if Ms. Kohn knew why she was leaving. Ms. Fonseca said yes.

The student then returned to Ms. Kohn and in an emotional scene accused her of having lied to him. That evening he told his mother about the incident and about his belief that Ms. Fonseca was leaving because of racism. The student's parent then telephoned Ms. Fonseca.

The next day Ms. Fonseca went to Ms. Kohn to inform her about her conversation with the parent. But before she could recount the conversation, Ms. Kohn accused her of having set her up by telling the student that Ms. Kohn knew her reasons for leaving. "Why didn't you tell them you were going to school?" she asked, indicating her inability to handle potentially volatile situations in an honest and rational manner. Ms. Kohn then added that she did not in fact know why Ms. Fonseca was leaving.

At this point, Ms. Fonseca became upset and asked how Ms. Kohn could say such a thing when not only had Ms. Fonseca discussed her reasons for leaving in depth with Ms. Kohn, but had also summarized this discussion in her letter of resignation. Ms. Kohn ended the interview by requesting that Ms. Fonseca put what she wanted to say in writing. Ms. Fonseca was thereby prevented from relaying to Ms. Kohn the information she had set out to share with her in that interview.

F. *Her Lack of Self-Control.* Ms. Kohn has displayed a lack of self-control in coping with the school's problems. These outbursts have only served to heighten the tensions already existing in the program.

95) After one all-school meeting in which many students challenged Ms. Kohn on her recent decisions concerning graduation and the student senate, one student approached Ms. Kohn and asked if she was alright. She lost control of herself and burst into tears, upsetting the student with anxieties about her and the future of the program.

96) One afternoon Ms. Kohn went out of her office and yelled across the hall that (one student) was psychotic.

97) In the middle of the staff meeting concerning Mr. McLean's resignation, Ms. Kohn abrubtly gathered her papers and angrily left the meeting, halting the discussion and leaving the issues unresolved.

98) On other occasions, Ms. Kohn has broken down crying when asked about the nature of a certain decision or the source of staff discontent. These reactions have stemmed from her affinity to identify such confrontations as directed against her personally, instead of at the policy or incident at hand.

VI. The Director's Precipitation Of A School-Wide Crisis.

The incapacities, inconsistencies, insensitivities, and inappropriate behaviors cited here on the part of the director have together propelled the program into an unprecedented crisis, as a result of which — the director and entire staff agree — the program is presently unable to serve the needs of students.

Probably the strongest indicator of this failure is the attitude and behavior of the students themselves. Students have frequently articulated a growing sense that the staff are echoing an official line, covering up, misrepresenting, and outright lying to them about any and all issues of importance that may arise. This powerful apprehension of staff deceit and disrespect has undermined any programmatic basis for the trust which is essential if learning and growth are to occur.

Consequently, the students resist classroom instruction by many means: by unpreparedness, by feigned or real lack of interest in curricular materials, by inattention to class discussions, and by outright refusal to participate.

Likewise, students find it easy to avoid confronting personal issues. In addition to a widening pattern of late arrivals and missed appointments, students misuse personal counseling through an insistence on solving school problems before their own. The students' perception of their counselors as representatives of a dishonest and manipulative staff further reduces their willingness to work in trusting relationships with them.

A heightened cynicism and anxiety are evident among the students in their anticipation of having to cope with these dynamics on a daily basis. The much-increased incidence of drug abuse among them is the most outstanding consequence of that anxiety.

Students characterize peer pressure to use drugs at New Perspectives not as the exception but the rule. The school is not able to offer them meaningful alternatives to this pressure, and the students regard as a joke the school's portrayal of itself as a drug-free community.

This state of affairs finds its most unfortunate expression in the students' inclination to drop out of classes and leave the program altogether. Since the rate of attrition is the most concrete index of the school's ability to provide services, an examination of the statistics will prove instructive in this regard.

At the start of the spring 1978 term, students enrolled in classes which would offer them a total of 154 high school credits. Students lost or dropped 73 of these. This yields, to date, a 47% attrition rate from individual classes.

Students participating in the program at the start of the term numbered 47. To date, 18 have dropped out completely. With 29 students remaining, this yields a 38% attrition rate from the program as a whole.

The critical relationship between these statistics and the

problems earlier discussed remains self-evident. Applying symbolically to all the students is Ms. Kohn's remark about one who left: "We were too confusing and didn't fulfill her needs."

But it is not only the attrition of students by which the nature of the school's crisis may be judged. The staff, too, has suffered an unusually high turnover which further demoralizes the students: 12 staff members have resigned in the last year.

Two of the most recent have shared their reasons for leaving: Ms. Fonseca expressed her unwillingness to continue to "lend legitimacy to the failure" of the program, and cited what she saw as the insolubility of the school's problems under the present director. Ms. McCleary stated she was "fed up" with school problems—and warned staff members: "It's terrible what we're doing to the kids and ourselves." Characterizing her resignation as a case of "self-protection", she stated "the program is falling apart".

But if its problems have rendered the program inoperable, and the present director stands as the foremost obstacle to resolving them, then the director herself has consistently failed to recognize this fact. Exacerbating the crisis is Ms. Kohn's own inclination to thrust responsibility for these problems back upon the staff members who raised them as issues to consider. Repeatedly she has asserted that the staff are to blame for the problems which have brought the school to a virtual halt from want of effective leadership.

Thus the director aggravates two-fold the crisis of confidence. Indeed, Ms. Kohn quite frankly acknowledges the mutual lack of trust between herself and staff. And in this preclusive atmosphere the staff is left without means to solve its problems, which in the view of the administrative assistant threaten the very existence of the school.

This threat is already manifest in conditions which encourage not learning, but complacency; not counseling, but resistance; not drug-free, but self-indulgent, students; not a therapeutic educational community, but an extensive network of cynicism and mistrust.

Impeded by leadership which witnesses the crises to which its failure has given rise and dismisses them as manifestations of adolescent anger on the part of the staff, we appeal to the Board to remove the director as the only solution to the problems documented in these pages.

Each of us swears that this document was compiled on our own personal time and entirely off of New Perspectives School premises.

The foregoing statements are subscribed and sworn to this 6th day of June, 1978, on the personal knowledge of one or more of the undersigned.

s/CAROLYN ANDERSON
Carolyn Anderson

s/PAUL STEIN
Paul Stein

s/DAWN FONSECA
Dawn Fonseca

s/WILLIAM TILDEN
William Tilden

s/WAYNE KLUG
Wayne Klug

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS JUNE 6, 1978

Sworn and subscribed before me by the above-named Carolyn Anderson, Dawn Fonseca, Wayne Klug, Paul Stein, and William Tilden, this 6th day of June, 1978.

s/illegible
Notary Public
My commission expires
1/4/85

EXHIBIT C

NEW PERSPECTIVES SCHOOL, INC.
74 Green Street, Brookline, Massachusetts 02146

617-232-1958

June 9, 1978

Director Sandra Kohn

Ms. Dawn Fonseca
101 Western Avenue
Cambridge, MA 02139

Dear Ms. Fonseca:

Your letter of resignation, dated May 16, 1978, was received and the Board of Directors was informed of your intention to resign.

I accept your resignation and I release you from any commitment to work in the summer session whether we have found a replacement for you or not.

In accepting your resignation, I am, of course, rejecting your verbal offer to withdraw it. I would like to thank you for your services as a teacher in New Perspectives School.

Sincerely,
s/JAMES W. SCHLESINGER
James W. Schlesinger
President

EXHIBIT D

Brookline
Chronicle Citizen

THE BROOKLINE CHRONICLE THURSDAY, JUNE 15, 1978

June 22, 1978
CORRECTION

Due to a typographical error, a letter in last week's paper read that teachers at the New Perspectives school had expressed a "willingness to participate in an illegality". It should have stated they expressed an "unwillingness."

'Inaccuracies by Board of Directors'

As teachers and counselors at New Perspectives School, we wish to correct several inaccuracies expressed in your article by members of the school's Board of Directors.

The first is their claim that "problems at New Perspectives have been distorted and exaggerated by a small group of students." In truth, students have been petitioning the Board of Directors for a year and a half concerning matters of student input, organization, and other grievances. All petitions contained the signature of at least half, and in most cases a majority, of the student body.

Second, Dr. Zarsky's figures concerning the number of students being — or not being — served are in error. He suggests that the school fails to help 10 out of 30 students, implying that 30 is the normal school population. In fact, the number of students attending during the regular school year has always been much higher, usually exceeding 50.

At the start of this term, 47 students registered for classes. To date, 18 have dropped out of the program entirely. (With 29 students remaining, this yields a 38 percent attrition rate.) To the 10 he dismisses, Dr. Zarsky must add an additional 18. This means there are now 28 students — well more than half the original 47 — whom the school is not serving.

Third, Mr. Schlesinger contends that better employment opportunities and a scarcity of teachers willing to make long-term commitments to New Perspectives account for the high rate of staff turnover at the school.

Of the 14 staffers to leave New Perspectives in the last two years (excluding psychiatric consultants), only two were lured away by the prospect of more attractive employment opportunities available through graduate school programs. Of the remaining 12, two were fired, two found better jobs after having left N.P.S., four found comparable jobs, one found part-time employment in another field, and another three faced unemployment. Eight of these 14 staffers had served at New Perspectives for three to five years each.

Fourth, documented evidence refutes Mr. Schlesinger's denial that Ms. Kohn lied or broke confidence with students. We understand, in fact, that the student picketing was prompted by what the students claim was a lie Ms. Kohn told them about the reasons for one teacher's resignation. Further, we do not understand why Mr. Schlesinger denies a "conspiracy on the part of the administration to deceive students through distortion of the truth," when, so far as we know, students never claimed that such a conspiracy existed.

Fifth, race and its cultural ramifications are a part of any student's identity — especially that of minority students. It would therefore not be possible, despite Mr. Schlesinger's suggestion to the contrary, to base counseling policy on students' individual needs while excluding racial considerations.

Sixth, one of us attended several Board meetings during the year in which two students served on that body, and — contrary to Mr. Schlesinger's and Dr. Zarsky's claim — saw no evidence that student members proved disruptive to the functioning of the Board.

Seventh, Mr. Schlesinger and Dr. Zarsky assert that last year's student-staff council "didn't work." To the contrary, the student-staff council, on which one of us served, was not given a reasonable opportunity to work. The interrelationship of roles and responsibilities among council members and between the council and the school as a whole were still in the process of being defined — and its by-laws yet to be ratified — when Ms. Kohn abolishes it.

Eighth, Mr. Schlesinger asserts that the Board of Directors has investigated student complaints. We know of no formal complaints made by students to the Board within the last year. Nor do we know of any investigations — "cautious" or otherwise — of student complaints undertaken by the Board of Directors.

We would like to remark upon one final inaccuracy. Student picketers were threatened with suspension not by one counselor, but by several. Through Ms. Kohn, Mr. Schlesinger last Tuesday morning directed the entire staff to contact any of their counselees who had joined the picket in front of the school Monday night. We were directed to inform them that continued picketing would result in their immediate suspension. Staff members did so.

Legal counsel had informed us, we told Ms. Kohn on Thursday, that the order prohibiting picketing was unconstitutional and illegal. We explained to her our willingness to participate in an illegality and indicated that if students were to ask our legal opinion of the matter, we would share with them what our counsel had told us.

Later that day, Ms. Kohn ordered us as follows: that we were to continue to tell the students they would be suspended for picketing the school, and that we were not under any circumstances to tell them that that threat was illegal.

Hereby, we believe, Mr. Schlesinger and Ms. Kohn have violated our own First Amendment rights to free speech.

Carolyn Anderson
Dawn Fonseca
Wayne Klug
Paul Stein
Bill Tilden

EXHIBIT E

June 15, 1978

Mr. James W. Schlesinger
Chairman, Board of Directors
New Perspectives School
74 Green Street
Brookline, Massachusetts

Dear Mr. Schlesinger:

As you know, we are dissatisfied with the manner in which the New Perspectives School is being run and the manner in which we, as its employees, are being treated. For months we have attempted to solve these problems internally, but these efforts have failed.

This letter is to inform you that we have contacted, and are in the process of joining, a labor organization for the purposes of representation and collective bargaining. As soon as we have delegated a bargaining agent, we will request that the Board of Directors recognize it as such.

Sincerely,
s/Carolyn Anderson
s/Wayne Kluc
s/William Tilden
s/Dawn Fonseca
s/Paul Stein

cc: Ms. Sandra Kohn
Ms. Susan Alford
Mr. David Bachrach
Mr. Joseph Gartner
Mr. Stephen Goldenberg
Ms. Rhoda Goodwin
Ms. Rita Hamburg
Mr. Rodney Jackson
Ms. Joanne Neiman
Ms. Rina Wald Spence
Ms. Tonia Yee
Dr. Edward Zarsky

EXHIBIT F

LAW OFFICES
GOLDSTEIN & PRESSMAN
P.O. BOX 125
678 MASSACHUSETTS AVENUE
CAMBRIDGE, MASSACHUSETTS 02139

July 7, 1978

James W. Schlesinger, President
The New Perspectives School, Inc.
215 Clark Road
Brookline, MA 02146

Re: Termination of Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca

Dear Mr. Schlesinger:

This law firm has been retained by the above-named individuals to represent them with regard to the termination of their employment as teacher/counselors at the New Perspectives School, Inc.

Wayne Klug, Carolyn Anderson, Paul Stein, and William Tilden were orally informed on or about June 16, 1978, by Sandra Kohn, Director of the School, that their employment was terminated, effective immediately. These terminations were effected without the named individuals having received any prior warning or notice that they might be terminated, without their being informed of any specific incidents on which their termination was based, and without their having any opportunity to rebut or answer any charges or complaints against them that might constitute just cause for their termination.

Dawn Fonseca tendered her resignation to the Board of Directors of the School in a letter dated May 16, 1978. Before the Board acted on this tender of resignation, Ms. Fonseca

orally notified you, as President, on or about June 8, 1978, that she was withdrawing this tender of resignation. She subsequently received a letter from you, dated June 9, 1978, purporting to reject her withdrawal of her resignation and formally notifying her of her termination.

Since the date of their termination, my clients have received no written notice of the reasons for their termination nor any opportunity to answer the reasons, if such reasons exist. The Personnel Practice Code of the School requires, as does federal and state law, that there be "just cause for any involuntary termination.

My clients feel that no just cause existed for their termination, but that such termination was due to their reasonable exercise of their professional responsibilities and their exercise of their rights under the First Amendment to the United States Constitution and the Massachusetts Labor Relations Act. Their termination was thus violative of their rights under the United States Constitution and Chapter 150E of the Massachusetts General Laws.

My clients hence demand that they be immediately reinstated and given full back pay. You are further requested to provide to my clients and to me proper written notice specifying the allegations which you consider to constitute just cause for their termination. You are further requested to appoint and convene immediately an impartial Grievance Committee to conduct a hearing in this matter, at which hearing my clients can be represented by counsel, can hear and challenge the allegations against them, can present evidence on their own behalf, and can record the proceedings on a tape recorder.

My clients are not hereby waiving any rights they may have to seek immediate relief through other appropriate legal channels.

I hope to hear from you as soon as possible.

Sincerely,
Kurt M. Pressman

KP/km
cc: Sandra Kohn, Director
Stephen Goldenberg
Joseph Gartner
Joanne Neiman
David Bachrach
Rodney Jackson
Rina Wald Spence
Susan Alford
Rhoda Goodwin
Rita Hamberg
Tonia Yee
Bud Zarsky

EXHIBIT G

LAW OFFICES
GOLDSTEIN & PRESSMAN
P.O. BOX 125
678 MASSACHUSETTS AVENUE
CAMBRIDGE, MASSACHUSETTS 02139

July 20, 1978

James W. Schlesinger, President
The New Perspectives School, Inc.
215 Clark Rd.
Brookline, MA 02146

Re: Termination of Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca

Dear Mr. Schlesinger:

I have been informed by my clients that you have appointed a grievance committee from within the Board of Directors to

"review the circumstances" surrounding the discharge of the five teachers. The grievance committee you have appointed reportedly consists of Edward Zarsky, Joseph Gartner, and Rita Hamberg.

On behalf of my clients I would like to object strongly to the composition of this committee. My clients feel this is not a fair, impartial, and unbiased committee in that several of the individuals, particularly Mr. Zarsky, have expressed hostility and opposition to my clients in the past with regard to this and other matters, as well as prejudgment of the issues in this dispute. As a matter of fairness and of law, other impartial, and unbiased individuals must be appointed to replace these committee members.

In addition, a proceeding in which the grievance committee merely interviews separately various individuals and makes a recommendation to the entire board is not sufficient. As expressed in my letter to you of July 7, 1978, you are required to provide prior written notice to me and my clients as to the charges against them and an opportunity for a full and fair hearing in which they can hear and challenge the statements and charges of other individuals against them.

Please contact me within one week to let me know whether you will change the composition of the girevance committee and whether my clients will be afforded the type of proceeding to which they are entitled by law.

Sincerely,
Kurt M. Pressman

KP/km

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-2236C

SHEILA RENDELL-BAKER,

PLAINTIFF

v.

SANDRA KOHN, Individually and as Director of the New Perspectives School, Inc.; SUSAN ALFORD, JOHN BUSINGER, JACKIE W. COOPER, STEPHEN B. GOLDENBERG, RODNEY JACKSON, JOANNE NEIMAN, JAMES W. SCHLESINGER, RINA WALD SPENCE, TONIA YEE, EDWARD ZARSKY, Individually and as Members of the Board of Directors of New Perspectives School, Inc.; NEW PERSPECTIVES SCHOOL, INC.; FRANCIS X. BELLOTTI, as Chairman of the Commonwealth of Massachusetts Committee on Criminal Justice; ROBERT J. KANE, as Executive Director of the Committee on Criminal Justice; JAMES GREGG, as Acting Director of the Law Enforcement Assistanfe Administration; GRIFFIN BELL, as United States Attorney General,

DEFENDANTS

COMPLAINT

Introduction

1. This is a civil action brought by plaintiff, a teacher and vocational counselor who was discharged by a publicly funded and regulated school in retaliation for her exercise of her right to free speech. This action seeks redress for violations of her constitutional rights to due process and equal protection of the laws and the right to free speech. Injunctive and declaratory relief as well as compensation is demnded.

Jurisdiction

2. Jurisdiction is conferred upon this Court by 28 U.S.C. 1331, 1343, 1361, and the First and Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction is

also conferred upon this Court for the entry of declaratory relief under 28 U.S.C. 2202 and 2210. This action is also authorized by 42 U.S.C. 1983 to redress deprivations of constitutional rights under color of state law.

3. The amount in controversy exceeds $10,000.00 exclusive of costs and interest.

Parties

4. Plaintiff Sheila Rendell-Baker resides at 1578 Beacon Street, Brookline, Massachusetts. Until her discharge on or about January 3, 1977, she was employed at the New Perspectives School, Inc.

5. Defendant Sandra Kohn is the director of the New Perspectives School, Inc., and is a member of the School's board of directors. As such she is responsible for the day to day operations of the School. In this capacity, her principal place of business is 74 Green Street, Brookline, Massachusetts.

6. Defendants Susan Alford, John Businger, Jackie W. Cooper, Stephen Goldenberg, Rodney Jackson, Joanne Neiman, James W. Schlesinger, Rina Wald Spence, Tonia Yee, Edward Zarsky are members of the board of directors of the New Perspectives School, Inc. In this capacity they are responsible for the overall operation of the School. Their principal place of business in this connection is 74 Green Street, Brookline, Massachusetts.

7. Defendant New Perspectives School, Inc. is incorporated under the laws of the Commonwealth of Massachusetts, and provides public high school facilities for those students in the Commonwealth who cannot function in a traditional high school. It is funded and regulated by local, state and federal governments and has as its principal place of business, 74 Green Street, Brookline, Massachusetts. James W. Schlesinger is president of the board of directors of the School.

8. Defendant Francis X. Bellotti is sued in his capacity as chairman of the Commonwealth of Massachusetts Committee

on Criminal Justice and as such has responsibility for the operations of its programs, including the funding of the New Perspectives School, Inc. and plaintiff's position there.

9. Defendant Robert J. Kane is sued in his capacity as executive director of the above described Comittee on Criminal Justice and is responsible for the day to day operations of its programs including the funding of New Perspectives School and plaintiff's position there.

10. James Gregg is sued in his capacity as Acting Director of the Law Enforcement Assistance Administration (L.E.A.A.) a federal agency within the Department of Justice, an executive department of the United States. L.E.A.A. funds the Committee on Criminal Justice and the employment position of plaintiff's.

11. Griffin Bell is sued in his capacity as United States Attorney General who has the ultimate responsibility for the operations of the Department of Justice, a federal executive department. As such he has over all responsibility of the operation of the Law Enforcement Assistance Administration.

Statement of Facts

12. Plaintiff Sheila Rendell-Baker was employed as a teacher and vocational counselor at the New Perspective School, Inc. (hereinafter the School), on January 1, 1976. In this position she taught typing to students of the School and assisted students in obtaining suitable employment during the school year and upon graduation.

13. Plaintiff had been hired with the explicit understanding that she would continue in her position through the second year, with a pay raise. In the fall of 1976, defendant Kohn informed plaintiff that she would continue in her position through 1977.

14. The New Perspectives School, Inc. is a non-profit Massachusetts Corporation providing free education to young people who have problems completing high school level study in public schools. It is commonly described as an alternative high school. The School is primarily funded through public funds received from the Commonwealth of Massachusetts through the Committee on Criminal Justice and the Division of Drug Rehabilitation of the Massachusetts Department of Public Health, and Massachusetts Department of Education through Chapter 766 of the Acts of 1972. The School also received funding through the federal Law Enforcement Assistant Administration.

In the fiscal year from July 1, 1975 to June 30, 1976 the School's total budget of $118,944.39 came from:

(a) 15.9% from Town of Brookline Youth Resources.

(b) 34.4% from Division of Drug Rehabilitation of the Department of Mental Health.

(c) 12.6% from the office for children

(d) 5% from the Division of Youth Services

(e) 4% from D.F.C.S.

(f) 10% from cities and towns under the Ch. 766 state program.

Totaling more than 80% in public funds.

15. The School is regulated through statutes and regulations and funding criteria of each of the funding agencies.

16. The School functions as part of the Commonwealth's educational system and as part of a juvenile delinquency and drug abuse program sponsored by the Commonwealth and the United States.

17. Plaintiff's employment position at the School is directly funded by a grant from L.E.A.A. to the Committee on Criminal Justice, through the Town of Brookline to the School. Plaintiff was paid approximately $10,000.00 per year in her position.

18. Prior to January 3, 1977, plaintiff had received no

warnings nor adverse comments from her supervisor regarding her employment performance. Upon information and belief, plaintiff's performance in her work at the School was satisfactory.

19. On or about December 2, 1976 a group of students presented a petition signed by twenty-two (22) students to a meeting of the Board of Directors of the School. Said petition (a copy of which is attached hereto as Exhibit A, and incorporated herein by reference) called to the attention of the Board, that defendant Kohn (Director of the School) had stripped the Student-Staff Council of all role in the hiring and firing of School personnel. Said petition was critical of defendant Kohn.

20. At the meeting of the Board of Directors at which said petition was presented, plaintiff voiced support for the Student-Staff Council as a benefit to the School and urged that it be given a responsible role in the School's affairs. Plaintiff's position was opposed by defendant Kohn.

21. At the direction of defendant Kohn, the School's administrative assistant, Nancy Lincoln, notified the Committee on Criminal Justice by letter on or about December 13, 1976, that plaintiff was terminated from her position at the School.

22. Plaintiff received no notice of said termination prior to December 13, 1976.

23. On January 3, 1977, without prior notice, defendant Kohn tried to convince plaintiff to resign. When plaintiff refused to resign she was terminated by defendant Kohn.

24. At no time prior to said termination, nor subsequent to it did plaintiff receive any specifics as to the cause for termination, nor any opportunity to respond to any allegations of cause for her termination.

25. Plaintiff was terminated for her support of the Student-Staff Council, and Student-Staff responsibilities as outlined in said petition.

26. Said petition was an appropriate exercise of the

students' right to free speech and consistent with the stated goals of the School and the funding and regulatory agencies of the state and federal government.

27. Plaintiff's support for said actions of the students in their efforts to establish a Student-Staff Council was a proper exercise of her rights to free speech.

28. Plaintiff's acts, with regard to said petition were not disruptive of the educational function of the School, and occurred outside of the educational function.

29. Defendant Kohn knowingly and wilfully and with malice violated plaintiff's right to speech and assembly by the termination of plaintiff's employment.

30. Since Plaintiff's termination, the defendant Board members and defendant Kohn have placed in the records of the Department of Employment Security, allegations that plaintiff was drinking alcoholic beverages with minor students, and incited students to revolt.

31. It is believed that the defendants placed the same allegations in the records of the School, the Committee on Criminal Justice and other agencies.

32. These allegations, although false, have placed a stigma on plaintiff's employment record, which will prejudice her future employment prospects.

33. Plaintiff, in spite of substantial efforts, has been unable to obtain suitable employment since her termination.

34. Plaintiff, through counsel, has sought a hearing on this matter from defendants (see correspondence attached as Exhibits B, C, D, E, F). A hearing was promised by the School and its Board members but has never been held, nor has plaintiff been given notice of the alleged reasons for her discharge.

35. Plaintiff has exhausted all available administrative remedies.

36. The non-federal defendants have acted at all times, in connection with the issues of this complaint, under color of state law and/or as agents of the federal defendants.

First Claim

37. Plaintiff's record carries the stigma of defendants' false allegations and thereby prejudices her future employment in violation of her due process and equal protection guarantees of the Fifth and Fourteenth Amendments to the United States Constitution.

Second Claim

38. Defendants' actions in terminating plaintiff's employment have violated her rights to free speech contrary to the guarantees of the First, Fifth and Fourteenth Amendments to the Constitution of the United States, in that plaintiff was fired for the legitimate exercise of her rights to speech and assembly. Said violations were wilful and knowing and malicious.

Third Claim

39. Plaintiff has an entitlement to the position from which she was terminated creating a property and liberty interest in her position protected by due process and equal protection guarantees of the Fifth and Fourteenth Amendments to the United States Constitution.

40. Plaintiff's discharge from employment without prior notice and a proper hearing violated these rights.

WHEREFORE, plaintiff prays this Court enter a judgment as follows:

1) A temporary injunction directing the immediate reinstatement of plaintiff with back pay.

2) A preliminary injunction directing the reinstatement of plaintiff with full back pay pending a determination of this action.

3) A permanent injunction against the acts complained of in this complaint.

4) A judgment for full back pay plus interest, from the date of plaintiff's discharge.

5) An award of compensatory and punitive damages in the amount of $50,000.00 to be jointly and severably assessed against defendants.

6) An order directing defendants to remove all false allegations from all records and enjoining defendants from maked further similar allegations in any form to any person.

7) A declaratory judgment that the acts of defendants complained of are illegal.

8) A declaratory judgment that plaintiff cannot be terminated for the proper exercises of First Amendment rights.

9) A declaratory judgment that plaintiff may not be discharged without prior notice and a prior appropriate hearing consonant with the guarantees of due process and equal protection.

10) An award of reasonable attorney's fees and costs of bringing this action.

11) Such other and further relief as this Court deems just and proper.

By her attorney,
ROBERT J. DOYLE
DOYLE, PLAYTER & NOVICK
462 Talbot Avenue, P.O. Box A
Dorchester, MA 02124
825-7311

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 78-2402-MA

WAYNE KLUG, ET AL.,
PLAINTIFFS

v.

THE NEW PERSPECTIVES SCHOOL, INC., ET AL.,
DEFENDANTS

MOTION TO DISMISS OR TO STAY PROCEEDINGS

Pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, defendants hereby move to dismiss the Complaint for failure to stand a claim upon which relief can be granted or in the alternative to stay the proceedings in this matter until such time as the State administrative proceedings and State judicial proceedings have been concluded. In support of this motion, defendants state:

1. This case is primarily a labor dispute between five (5) employees of the defendant and the defendant, a private school in Brookline, Massachusetts. The plaintiffs here have brought a petition before the State Labor Relations Commission which is now pending. That matter is being treated by the State Labor Relations Commission as a case involving a private employer in its relations with five of its employees. As a matter of fact and law, the case involves no State action within the meaning of the Fourteenth Amendment and therefore this Court does not have subject matter jurisdiction over the plaintiffs' claim. Rule 12(b)(1).

2. Alternatively, the plaintiffs do not state a claim upon which relief can be granted. While ordinarily the plaintiffs need not exhaust State administrative remedies before suing in Federal Court (assuming they have standing to sue, see Paragraph 1 above), plaintiffs must exhaust at least some of their State administrative and judicial remedies when there

are State procedures that adequately protect federal rights. See *Dillard* v. *Industrial Commission of Virginia*, 416 U.S. 783, 793-98 (1974); *Gibson* v. *Berry Hill*, 411 U.S. 564, 574-75 (1973); See also *Wishart* v. *McDonald*, 500 F.2d at 1114, N.4 citing the *Dillard* and *Gibson* cases favorably.

3. Where as here the plaintiffs are seeking injunctive relief but they have failed to adequately allege irreparable harm and have further failed to move for injunctive relief, the plaintiffs must at least allow the administrative process to run before obtaining judicial review. *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50-1 (1938). Moreover, the plaintiffs have not alleged that the State administrative agency cannot fully satisfy their claims and have not alleged that the administrative process would be futile either because of precedent or some other bias. To the contrary, plaintiffs by pressing their claim before the State Labor Relations Commission (five (5) full days of hearing have been held and Memoranda of Law have been filed and the case is presently before the Commission for its determination of plaintiffs' claims for full back pay and reinstatement) have demonstrated their primary reliance for relief upon the State agency.

WHEREFORE, defendants move that the Complaint be dismissed or, alternatively that the matter be stayed pending exhaustion of State administrative and judicial remedies.

By their attorney,
RICHMOND, KASSLER, FEINBERG & FEUER, P.C.
s/MATTHEW H. FEINBERG
Matthew H. Feinberg
85 Devonshire Street
Boston, MA 02109
Tel. No. (617) 227-4800

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 77-2236-C

SHEILA RENDELL-BAKER,
PLAINTIFF

v.

SANDRA KOHN, et al.,
DEFENDANTS

MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS BELLOTTI AND HIGHGAS

The defendants Francis X. Bellotti and William Highgas (succeeding to the position of Robert J. Kane as Executive Director of the Committee on Criminal Justice) move pursuant to Fed. R. Civ. P. 56 for summary judgment. In support thereof the defendants state that there is no genuine issue of material fact and that these defendants are entitled to judgment as a matter of law.

Defendants Bellotti and Highgas note that the Court has already scheduled oral argument on this motion for February 4, 1980. The defendants anticipate that they will require approximately 15 minutes of oral argument and request leave to submit a memorandum of law at the hearing.

By their attorney
FRANCIS X. BELLOTTI
ATTORNEY GENERAL
s/BETTY E. WAXMAN
BETTY E. WAXMAN
One Ashburton Place
Boston, MA 02108
(617) 727-1004

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 78-2402-MA

WAYNE KLUG ET AL.,
PLAINTIFFS

v.

THE NEW PERSPECTIVES SCHOOL, INC., ET AL.,
DEFENDANTS

AFFIDAVIT OF WAYNE KLUG IN OPPOSITOIN TO DEFENDANTS' MOTION TO DISMISS

I, Wayne Klug, a plaintiff in the above-entitled action, being duly sworn, do hereby depose and state:

1. I was employed as a teacher and counselor at the defendant New Perspectives School, Inc. (hereinafter referred to as "the School") from December, 1975 until June 16, 1978.

2. In the course of my employment I became familiar with the types of alternative educational programs which are provided by the Town of Brookline, the City of Boston, and other cities and town in the Boston area.

3. The Town of Brookline, from which a large number of the School's students come, has no educational programs which can meet the special needs of the students which it refers to the School, within its public school system. The School provides small, highly-structured classes at night to encourage students to obtain employment during the day, places a strong emphasis on individual counselling, and has a substantial vocational program for which students can receive school credit.

4. There are few, if any, comparable programs offered by any of the other cities and towns which rely on the School to provide the educational services it provides.

5. The Brookline School Committee authorizes the School to issue high school diplomas and certifies such diplomas.

6. The School is strictly regulated by the Brookline School Committee and/or the Massachusetts Department of Education or a subdivision thereof, which impose minimum curriculum requirements, total credit requirements, teacher certification requirements, and numerous other requirements regulating in large measure the School's educational program.

7. Under the contracts into which the School enters with its funding sources, numerous additional requirements are imposed upon the School, including but not limited to the right to inspect the School's financial records, compliance with the promulgated rules and regulations of the various governmental agencies, licensing requirements, obligation to accept court-referred and agency-referred students, reporting requirements, and general compliance with the statutes regulating public education, including M.G.L. c. 71B. Attached to this affidavit are contracts between the School and the Massachusetts Division of Drug Rehabilitation (A) and the Boston School Committee (B) for 1976-77, the provisions of which are essentially the same for the respective contracts for the year 1977-78. Attached also are Ch. 766 regulations from the state Department of Education. (C)

8. The said contract between the School and the Boston School Committee explicitly states on the first page thereof that the purpose of the contract is to enable the Boston School Committee to comply with its statutory obligation under M.G.L. c. 71B.

9. In 1976-77, the School's operating budget was approximately $204,118.00. Of this amount, approximately $172,508.00, or 85% came from funds received from the Commonwealth of Massachusetts or a subdivision thereof, including the Division of Drug Rehabilitation, the Boston 766 Program, the Brookline 766 Program, and the Brookline Youth Resources Bureau. Approximately $17,100 was received from the federal government, and $14,500 was received from private sources (only 7% of the budget). The same relative

proportions of its income applies also to the School's 1977-78 budget.

10. All of the statements in paragraphs 3 to 9 above are made to the best of my knowledge and belief.

11. The plaintiffs have not had an opportunity to conduct discovery in this action and expect that they would be fully able to document the above statements and other aspects of the School's relationship to the Commonwealth in the course of such discovery.

Signed and sworn under the pains and penalties of perjury this 6th day of February, 1980.

s/WAYNE KLUG
WAYNE KLUG

MIDDLESEX, SS. FEBRUARY 6, 1980

Then personally appeared the above-named Wayne Klug before me and acknowledged the foregoing to be his true act and deed.

s/ILLEGIBLE
Notary Public
My commission expires:
July 19, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
(Title omitted in printing)

DEFENDANT SANDRA KAHN'S ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

23. The following information is given rounded off:

(a) For Fiscal Year 1975-76 — Chapter 766 — $11,000.00; Town of Brookline — $18,000.00; Department of Mental Health — $40,000.00; Department of Youth Services — $6,000.00; Mass. Division of Family and Children's Services — $4,000.00; Office for Children — $14,000.00; LEAA — $8,000.00; Private Contributors and Foundations — $9,000.00

(b) For Fiscal Year 1976-77 — Chapter 766 — $66,000.00; Town of Brookline — $30,000. Department of Mental Health — $39,000.00; Department of Youth Services — $5,000.00; Division of Family and Children's Services — $2,000.00; Office for Children — $2,000.00; LEAA — $17,000.00; Individuals and Private Foundations — $2,000.00.

(c) For Fiscal Year 1977-78 — the only full funding we can state would be the Department of Mental Health — $40,000.00 and the Town of Brookline — $28,000.00.

24. State the names and addresses of each local, county, state or federal agency, subdivision, or department which regulates or regulated the School in any way in the years 1975, 1976, 1977, and 1978.

State Department of Education, Regional Review Board, Rindge Avenue, Cambridge, Mass.; Brookline School Committee, Brookline Town Hall, Brookline, Mass.; Mass. Department of Mental Health, 190 Portland Street, Boston, Mass.; Committee on Criminal Justice, 80 Boylston Street, Boston, Mass.

25. Identify all regulations and guidelines which apply to the School by title or number, and indicate whether said regulations and guidelines are published.

We receive guidelines published by the Department of Education and by the Department of Mental Health.

26. Give the names and addresses of the source of funds for the position which was held by the plaintiff at the School during her employment, including those agencies through which the funds passed to the School.

The LEAA funds were used for the position held by the plaintiff during her employment, and these funds were paid to the School through the Town of Brookline.

27. Give the names and home addresses of all persons who supplied you with information upon which you base your statement contained in paragraph 12 of your Answer to this Complaint.

See the answer to Interrogatory #6 above.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-2236-C

SHEILA RENDELL-BAKER,

v.

SANDRA KOHN, ET AL.

DEFENDANT
NEW PERSPECTIVES SCHOOL, INCORPORATEDS',
ANSWERS TO PLAINTIFF'S FIRST SET OF
INTERROGATORIES

1. State the name and home address of the person answering these interrogatories and the position held by said person at New Perspectives School, Inc. (hereinafter the "School").

James W. Schlessinger, President of New Perspectives School Incorporated, 215 Clark Road, Brookline, Massachusetts.

2. State your present duties relating to the School.

I am President of the Corporation.

3. What were your duties at the School in December of 1976?

I was President of the Corporation.

4. Give the names and home addresses of all servants, agents and employees and teachers and counselors of the School as of the date of the answering of these interrogatories, and the job title of each.

The following people are employed by the School:

Anderson - Reading
Arsenault - Drafting
Capuano - Social Studies
Cushner - Vocational Counsellor
Evans - Art and Physical Education
Fonseca - Social Studies, English
Ford - English and Sociology
Goode - Psychiatrist

Klug - English
Kohn - Director
Levine - Math
Lincoln - Administrative Assistant
McCleary - Counsellor
Meshon - Counsellor
Oakley - Photography
Phillips - Nurse
Richmond - Social Studies
Stein - Math and Science
Tilden - Counsellor

5. Give the names and home addresses of all servants, agents and employees and teachers and counselors of the school as of December 12, 1976, and the job title of each.

In December of 1976, the following were employed:

Anderson - Reading
Atherton - Math and Science
Behn - Social Studies
Belfer - Psychiatrist
Cushner - Photography
Evans - Art
Ford - English
Harmon - Psychology
Hogarth - Counsellor
Howe - Sewing
Klug - Video and Drama
Kohn - Director
Lincoln - Administrative Assistant
Lerner - Science
McCleary - Counsellor
Patterson - English and History
Phillips - Nurse
Rendell-Baker - Vocational Counsellor
Winnik - Health

6. Describe the process by which day-to-day decisions are made for the School. Please be specific as to (a) routine decisions, and (b) major policy decisions.

(a) Routine decisions are made by the Director, often after discussion with staff members; and

(b) Major policy decisions would be made by the Board of Directors.

7. Describe the process by which (a) counselors were discharged, and (b) teachers were discharged in 1976.

Counselors and Teachers are discharged by the Director.

8. Describe the process by which (a) counselors are hired, and (b) teachers are hired.

Counselors and Teachers go through a series of interviews and a final decision on hiring is made by the Director.

9. State the number of students enrolled in the School in December of 1976, and December of 1977.

The enrollment of the School is fifty students.

10. For all students are the School in December of 1977, indicate:

(a) from where each student was referred to the school,

(b) from where the funding for each student came and

(c) what regulations were applicable to each student, if any (include all Federal, state, county and municipal regulations).

10. Students are referred by the Massachusetts Division of Youth Services, by various Community Agencies and the majority by Public School systems. Funding comes for one student from the Division of Youth Services, for six students from the Department of Mental Health, and for forty-three students under the Chapter 766 Program. The Corporation is subject to regulations promulgated under Chapter 766, under the Department of Mental Health, Division of Drug Rehabilitation, and under the Massachusetts Department of Youth Services.

11. Give the names and addresses of all governmental

bodies, subdivisions and agencies which have licensed or certified the School. Include in your answer a description of all licenses and certificates.

We are licensed by the State Department of Education as a Chapter 766 certified school through the Regional Review Board on Rindge Avenue in Cambridge, Mass.; we are certified by the Brookline School Committee at the Town Hall in Brookline, Mass.; we have a license as a non-residential Drug Treatment Program by the Department of Mental Health, Division of Drug Rehabilitation, 190 Portland Street, Boston, Mass.; and we are certified for school purposes by the Building Commissioner of the town of Brookline, Brookline, Mass.

SUBSCRIBED under the pains and penalties of perjury.

s/JAMES W. SCHLESINGER
JAMES W. SCHLESSINGER, PRESIDENT
New Perspectives School, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 77-2236-C

SHEILA RENDELL-BAKER,
PLAINTIFF
v.
SANDRA KOHN, et al.,
DEFENDANTS

AFFIDAVIT OF WILLIAM HIGHGAS, JR.

I, William Highgas, Jr., being duly sworn depose and state that:

1. I am the Executive Director of the Massachusetts Committee on Criminal Justice.

2. The Massachusetts Committee on Criminal Justice, pursuant to G.L. c. 6, §§156 *et seq.*, accepts grants from the Law Enforcement Assistance Administration and awards subgrants to applicants for Law Enforcement Assistance Administration funding throughout the Commonwealth. Thus, the Committee on Criminal Justice is essentially a funding mechanism.

3. The Committee on Criminal Justice requires applications for subgrants to include a program description which contains the job qualifications and responsibilities of staff to be hired as part of the program. If a subgrant application is accepted, this program description is incorporated into a standard contract, attached as A. That portion of a subgrant application of New Perspectives School, Inc. setting forth the specifications for its vocational counselor for 1976 and 1977 is attached as B.

4. In addition, the Committee on Criminal Justice attaches standard subgrant conditions to all subgrants that it awards. See attachment C. These conditions, in general, govern the fiscal and programatic monitoring of subgrantees. The Committee may also attach special subgrant conditions to par-

ticular subgrantees, and did so with respect to New Perspectives School, Inc. for years 1976 and 1977. (See attachment D).

5. Along with subgrant provisions, subgrantees are also subject to rules, regulations, and directives of the Committee on Criminal Justice and the Law Enforcement Assistance Administration. These rules, regulations and directives relate to the administration and funding of subgrantees and are set forth in my answers to interrogatories #4(a), (b) and (c).

6. The Massachusetts Committee on Criminal Justice may suspend or terminate funding if there is a substantial failure to comply with conditions set forth in a subgrant application approved by the Massachusetts Committee on Criminal Justice and incorporated into the subgrantee's contract; standard or special subgrant conditions; and the rules, regulations, and directives of the Committee on Criminal Justice of the Law Enforcement Assistance Administration. None of these provisions, however, relate in any way to hearing requirements for suspending or terminating individuals employed by subgrantees.

7. Moreover, the Massachusetts Committee on Criminal Justice is not empowered, from my knowledge and experience to conduct hearings concerning disciplinary action or job terminations of individuals employed by its subgrantees.

Signed under the pains and penalties of perjury.

s/WILLIAM HIGHGAS, JR.
WILLIAM HIGHGAS, JR.
Executive Director of the
Committee on Criminal Justice

Subscribed and sworn to before me, a Notary Public on this 25 day of January, 1980.

s/JOHN J. FORD
My Commission expires:
3-13-81

COMMONWEALTH OF MASSACHUSETTS
COMMITTEE ON CRIMINAL JUSTICE

GRANT AWARD

The Committee on Criminal Justice hereby awards to Town of Brookline obo New Perspective School (hereinafter called the "Grantee") Project No. 76C-247.1123 in the amount of $17,100.00 for New Perspective School as authorized by Section 303 of the Omnibus Crime Control and Safe Street Act of 1968. (P.L. 90-351 as amended by P.L. 91-644) and the Crime Control Act of 1973 (P.L. 93-83).

These grant funds may be used until the individual project period ending on the date for the programs or projects enumeratedin the Grant Application with amendments by this Grant Award, subject to any limitations or conditions set forth in Attachment A to this Grant Award.

The Grantee shall administer the programs for which this grant is awarded in accordance with the applicable rules, regulations and conditions of the Committee, as set forth in the various sections of the Grant Application and Attachment A.

The grant shall become effective when the Grantee signs and returns a copy of the Grant Award to the Committee.

Committee on Criminal Justice
By: Michael S. Dukakis
Governor
By: Francis X. Bellotti
Attorney General, Chairman
By: Charles V. Barry
Secretary of Public Safety

Committee Meeting
Date: 12/1/75

The Town of Brookline hereby signifies its acceptance of the above described grant on the terms and conditions above or incorporated by reference therein.

Town of Brookline
Agency, City or Town
By: s/Robert C. Cochrane, Jr.
Name: Robert C. Cochrane, Jr.
Title: Chairman, Board of Selectmen
Date: February 17, 1976

RECEIVED
MAR 9 1976
COMMITTEE ON
LAW ENFORCEMENT AND
ADMIN. OF CRIMINAL JUSTICE

THE COMMONWEALTH OF MASSACHUSETTS
COMMITTEE ON CRIMINAL JUSTICE

February 5, 1976

Robert Cochrane, Chairman
Board of Selectmen
Brookline Town Hall
333 Washington Street
Brookline, MA 02146

Dear Mr. Cochrane:

On behalf of the Committee on Criminal Justice, I am pleased to forward the formal Grant Award Documents, approved by the Committee, for:

Grantee: Town of Brookline obo New Perspective School
Project No.: 76C-247.1123
Short Title: New Perspective School
Award Amount: $17,100.00

Once these documents have been reviewed, completed, signed, and returned to the Committee, we will forward an initial check for you and your grant.

The documents consist of:

1. *The Grant Award,* (GPSC-11), including Attachment "A", Special Conditions Applicable to this grant. Added to these, and to be considered as an integral part, are "Conditions Applicable to the Fiscal Administration of Grants" under Part C, Title I, P.L. 90-351, P.L. 91-644 and P.L. 93-83.

Necessary Action: The front sheet must be signed by the Chief Executive Officer.

2. *Initial Financial Report and Fund Request* (GPSC-12 and 12h) and instructions.

Necessary Action: Must be completed and signed by the Project Financial Officer.

3. *Cash Matching Certificate* (GPSC-16)

Necessary Action: Must be signed by the Chief Executive Officer.

We have included two complete sets of documents. The original set (signed by the Governor and Attorney General) should be returned to:

The Committee on Criminal Justice
Room 725
80 Boylston Street
Boston, MA 02116

no later than February 19, 1976.

The second set is for your files.

If you have any questions or find that you will be unable to return the signed documents within the specified time, please contact Chava Abrams who is a member of my staff, and may be reached at 727-6306.

Sincerely,
s/ROBERT KANE
ROBERT J. KANE
Executive Director

RJK:nm
Enclosures

TOWN OF BROOKLINE
Massachusetts

February 17, 1976

IN BOARD OF SELECTMEN

The Board considered the question of authorizing Chairman Robert C. Cochrane, Jr. to sign the Grant Award Documents for Project No. 76C-247.1123 — New Perspectives School, in the amount of $17,100.

Administration of the program is through the Human Relations-Youth Resources Commission and the Board was advised by Director Joseph F. McCormack that program funds have been cut in half. He stated that the required $950 matching cash contribution has been provided by the school.

After further consideration, it was on motion unanimously

VOTED: To authorize Chairman Robert C. Cochrane, Jr. to sign the Grant Award Documents for Project No.

76C-247.1123 — New Perspectives School, in the amount of $17,100.

Attest:
s/RICHARD T. LEARY
Executive Secretary

Joseph F. McCormack

PROJECT No. 76C-247.1123

COMMONWEALTH OF MASSACHUSETTS
COMMITTEE ON CRIMINAL JUSTICE
CASH MATCHING CERTIFICATE

Award of 1976 funds for Committee on Criminal Justice projects is consistent upon receipt and expenditure of cash matching appropriations by grantee units of government during the period of the projects. Total cash match required is 10% of total project costs, half of which (5%) is provided by the state, and the other half must be appropriated by local grantees. The state buy-in can also be computed on the basis of 5.555% of the federal award amount. Using this method, the total match required is 11.110% of the federal award amount. State agencies receiving federal grants must provide the *full* amount of the match.

Therefore, awards of 1976 funds by the Committee will require the completion of the following certification:

The Town of Brookline obo New Perspectives School herewith certifies that an appropriation of at least $950.00 designated for the purpose of matching LEAA funds will be sought from the governmental body responsible for appropriating funds for the grantee at the earliest opportunity which will be on or before 7/1/76.

The Committee must be kept informed of the status of the appropriation request in the grantee's budgeting and appropriation process. If no funds are appropriated for matching purposes, the grantee agrees to return to the Committee $17,100.00.

Signed: ROBERT C. COCHRANE, JR.
Robert C. Cochrane, Jr.
Title: Chairman, Board of Selectmen

SUBGRANT APPLICATION

Project Description: PROJECT IMPLEMENTATION

Begin below and add as many continuation pages as necessary.

The Vocational Component will continue to be implemented in the following manner:

1. Continually updated vocational assessment of total present NPS population.

2. A Career Awareness-Job Placement course is taught two afternoons per week (four hours) for which students receive credit. This course is divided into two parts. The first part relates directly to the world of work. It involves exploring job opportunities and investigating career areas of interest in depth. Students learn and practice the techniques of job hunting and interviewing and find out how to write resumes and fill out job applications. They also acquire knowledge about applying to college, training programs and other educational institutions. Discussions focus on work-related responsibilities. The second part of the course consists of field trips to possible places of employment for those presently unemployed.

3. Continued development of the job bank which includes full and part-time job placement, apprenticeships, and jobs which allow for career advancement through on-the-job training, etc.

4. Travel and outreach to make contact with businesses and other educational institutions through conferences in order to gather data on career possibilities for high school graduates. This public relations/job development aspect of the component has the goal of helping our students have a better chance in a very competitive job market.

5. Use of video tape equipment in class to do job-related role playing in simulating employer-employee interviews and relationships, as well as in presenting relevant material on industrial training and management to students who will be exploring career areas.

6. Use of copier for duplicating updated job information for circulation, and for running off all materials for voca-

tional/career course, for evaluation forms for employers and student employees, and other information for the vocational component.

7. Use of the van for transporting students to and from job interviews; field trips to possible places of employment (for those who are unemployed), and to vocational and college workshops for high school graduates. Van will also be used for on-site visits to monitor job placements as well as to attend conferences with prospective employers.

8. A typing course is being taught by the vocational counselor with the student assistant in order to broaden job possibilities for our matriculating students.

Staff + Staff Organization:

The Vocational Counselor shall hold a bachelor's degree and have at least two year's experience in the field of vocational rehabilitation and guidance, knowledge of the Greater Boston Area community resources, experience working with adolescents. He/she shall:

a. be responsible to the Director;

b. spend at least 40% of his/her time in the community with employers, potential employers, making on-site visits, etc., and accompanying and supporting students when indicated;

c. teach a full credit course each trimester (four hours per week) on job placement and career counseling; teach a full credit typing course each trimester;

d. be present at all staff meetings;

e. be responsible for the coordination of all aspects of this component as well as its evaluation.

(Our present vocational counselor plans to continue in this position.)

Explanation of attached color-coded time schedule of vocational counselor:

Blue: Out of office; time spent in travel away from school will consist of:

1. on-site visits to student's places of work to evaluate employment adjustments and develop rapport with employer;
2. job crisis intervention: visit workplace when student having trouble on the job; resolve problems between student, employer, school;
3. job development: visit businesses; attend career fairs to develop rapport with employers; find out specific jobs available to high school students; learn about workplaces;
4. attendance at professional organization meetings, seminars and workshops related to work;
5. visit professional colleagues for collaboration of efforts and for advice.

Red: Counseling students with:

1. problems on the job;
2. problems getting jobs and choosing career direction;
3. deciding and applying for higher education;
4. obtaining interviews for students;
5. teaching job skill techniques: how to fill out forms, write letters of application, resumes, etc.

Green: Administrative duties include:

1. supervising student assistant and assigning him/her work;
2. preparing for class: develop lesson plans, create materials, obtain movies, outside speakers;
3. compiling and writing government reports;
4. contacting employers and organizations by phone and taking job orders over phone;
5. reading and researching about careers;
6. ordering supplies.

Yellow: Assigned duties:

1. staff meetings to discuss administrative issues and individual students, as well as staff training under supervision of consulting psychiatrist;

2. teach career awareness course:
   a. bring in speakers from various occupations;
   b. occasional field trips;
   c. learn the mechanics of job hunting, i.e. filling out forms, resume writing, etc.;
   d. reviewing opportunities in higher education;
   e. methods of examining careers: what to look for, how to decide suitability;
   f. use of video tape equipment in class.
3. teach typing class four hours per week.

ATTACHMENT A

STANDARD SUBGRANT CONDITIONS

Standard Subgrant Conditions — The applicant understands and agrees that a subgrant received as a result of this application shall be subject to and incorporates the following conditions of the Law Enforcement Assistance Administration and the Committee on Criminal Justice. The subgrantee shall include provisions appropriate to effectuate the purposes of these conditions, in all contracts of employment, consultant's agreements or contracts issued under an approved application.

1. Any grant awarded pursuant to this application shall be subject to and will be administered in conformity with the Conditions Applicable to the Fiscal Administration of Grants and General Conditions Applicable to Administration Grants under Part C, Title I, of P.L. 90-351 and P.L. 91-644.

2. Funds awarded pursuant to this application will be used only for the *project set forth in the Project Description* or in any amendment thereunto duly filed with and approved by the Committee.

3. Any grant funds expended for increased compensation of regular law enforcement personnel, exclusive of funds spent for training or research and development, will be matched by state or local expenditures of at least an equal amount.

4. The applicant agrees to account for its federal grant funds, make quarterly financial reports and meet reasonable

fiscal and Administrative requirements; in accordance with the LEAA Guideline Manual for Financial Management (M 7100.1A and changes), Federal Management Circular FMC 73-2, FMC 74-4 and FMC 74-7, and the LEAA Procurement Manual (M 1700.6 and changes).

5. The applicant agrees to make quarterly narrative progress reports and meet reasonable monitoring requirements.

6. Funds awarded pursuant to this application will be used to supplement and not to supplant state or local funds otherwise available for law enforcement and criminal justice programs and, to the extent practical, will be used to increase commitment of such funds.

7. The staff and/or consultive competencies and resources necessary to assure successful conduct of the project will be provided. Prior approval of the Committee is required for staff hiring and salary increases of any kind, and for engaging consultants in accordance with OMB Circular A-102 and Federal Procurement Manual, M 1700.6.

8. The applicant will comply with and will ensure compliance by its contractors with Title VI of the Civil Rights Act of 1964 and all requirements imposed by or pursuant to regulations of the Department of Justice (28 C.F.R. Part 42) issued pursuant to that title, to the and that no person shall, on the grounds of race, color, sex or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity for which the applicant receives federal financial assistance from the grantor.

9. Pursuant to Section 521 of the Omnibus Crime Control and Safe Streets Act, as amended, all records, papers and other documents kept by recipients of LEAA funds shall be made promptly available upon request to any person for inspection and copying.

10. All equipment having a unit cost of over $25.00 purchased with grant funds will be marked with an identifying

number which will include the project number. An inventory list will be maintained and will be available for inspection and audit. All such equipment will be accounted for in the project final financial report and will revert to the Committee unless written permission is received to retain the equipment.

11. Unless the project is initiated and funds have begun to be meaningfully expended within ninety (90) days of the receipt of the grant award package, the Committee reserves the right to terminate the grant and any funds received must be returned forthwith to the Committee.

Authorizing Official _____ Date _____

COMMONWEALTH OF MASSACHUSETTS
COMMITTEE ON CRIMINAL JUSTICE
GRANT AWARD
ATTACHMENT A
SPECIAL CONDITIONS

PROJECT No. 76C -247.1123

Approval of the application by the Town of Brookline obo New Perspective School for programs or projects related to New Perspective School as authorized by Section 303 of the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351 as amended by P.L. 91-644) and the Crime Control Act of 1973 (P.L. 93-83), is contingent upon the grantee's compliance with the following Special Conditions:

1. Grantee agrees to provide a revised workplan for Committee approval within thirty (30) days of the receipt of the grant award. This workplan shall include:

a. A schedule of major tasks to be performed by the project in 1976;

b. More specific measures of accomplishment for the vocational component;

c. Detailed qualifications for the two staff positions approved for funding.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 77-2236-C

SHEILA RENDELL-BAKER,
PLAINTIFF
v.
SANDRA KOHN, et al.,
DEFENDANTS

SUPPLEMENTAL AFFIDAVIT OF WILLIAM HIGHGAS, JR.,

I, William Highgas, Jr., being duly sworn depose and state that:

1. I am the Executive Director of the Massachusetts Committee on Criminal Justice.

2. As I stated in a previous affidavit, the Massachusetts Committee on Criminal Justice, pursuant to G.L. c. 6, §§156, *et seq.*, accepts grants from the Law Enforcement Assistance Administration and awards subgrants to applicants for Law Enforcement Assistance Administration funding throughout the Commonwealth. Thus, the Committee on Criminal Justice is essentially a funding mechanism.

3. The Committee on Criminal Justice imposes standard subgrant conditions on its subgrantees. These conditions were attached to my first affidavit and marked as "C."

4. Paragraph 7 of the standard subgrant conditions provides, in relevant part, that the Committee on Criminal Justice must give prior approval to staff hired by subgrantees. In order to determine whether prior approval should be granted, the Committee on Criminal Justice reviews resumes submitted by subgrantees to ensure that the stated qualifications of an applicant are consistent with the qualifications for the position which have been proposed by the subgrantee and approved by the Committee. See attachment B to my first affidavit for the qualifications at issue here.

5. Neither I nor any other official or employee of the Committee on Criminal Justice interview applicants for staff positions with a subgrantee or exercise any other control over the hiring process.

Signed under the pains and penalties of perjury.

s/WILLIAM HIGHGAS, JR.
WILLIAM HIGHGAS, JR.
Executive Director of the
Committee on Criminal Justice

Subscribed and sworn to before me, a notary public on this 29 day of January, 1980.

s/JOHN J. FORD
My commission expires:
3/13/81

Principles for Determining Costs Applicable to Grants and Contracts With State and Local Governments

A. *Purpose and scope.*

1. *Objectives.* This Attachment sets forth principles for determining the allowable costs of programs administered by State and local governments under grants from and contracts with the Federal Government. The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal and State or local participation in the financing of a particular grant. They are designed to provide that federally assisted programs bear their fair share of costs recognized under these principles, except where restricted or prohibited by law. No provision for profit or other increment above cost is intended.

2. *Policy guides.* The application of these principles is based on the fundamental premises that:

a. State and local governments are responsible for the efficient and effective administration of grant and contract programs through the application of sound management practices.

b. The grantee or contractor assumes the responsibility for seeing that federally assisted program funds have been expended and accounted for consistent with underlying agreements and program objectives.

c. Each grantee or contractor organization, in recognition of its own unique combination of staff facilities and experience, will have the primary responsibility for employing whatever form of organization and management techniques may be necessary to assure proper and efficient administration.

3. *Application.* These principles will be applied by all Federal agencies in determining costs incurred by State and local governments under Federal grants and cost reimburse-

ment type contracts (including subgrants and subcontracts) except those with (a) publicly financed educational institutions subject to Bureau of the Budget Circular A-21, and (b) publicly owned hospitals and other providers of medical care subject to requirements promulgated by the sponsoring Federal agencies.

B. *Definitions.*

1. *Approval or authorization of the grantor Federal agency* means documentation evidencing consent prior to incurring specific cost.

2. *Cost allocation plan* means the documentation identifying, accumulating, and distributing allowable costs under grants and contracts together with the allocation methods used.

Office-Supreme Court, U.S.
FILED
AUG 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2102

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

SHEILA RENDELL-BAKER,
Petitioner,

v.

SANDRA KOHN, ET AL.,
Respondents,

WAYNE KLUG, ET AL.,
Petitioners,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS BELLOTTI AND HIGHGAS IN OPPOSITION TO THE PETITION FOR THE WRIT OF CERTIORARI

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Thomas R. Kiley, Counsel of Record

Betty E. Waxman
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-1004

No. 80-2102

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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BRIEF OF RESPONDENTS BELLOTTI AND HIGHGAS IN OPPOSITION TO THE PETITION FOR THE WRIT OF CERTIORARI

QUESTION PRESENTED

Is the dismissal of a teacher for open advocacy of student participation in a private school's personnel matters an activity directly related to the school's contracted public function of providing special education?

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STATEMENT OF THE CASE

Prior Proceedings

Plaintiff Sheila Rendell-Baker filed this action for injunctive relief and for damages on July 28, 1977 (Pet. for Cert. 1)[1/] to redress her discharge as a teacher and vocational counselor at the New Perspectives School, Inc. Violations of the First, Fifth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C.A. §1983 (West Supp. 1981) are alleged on the basis that, among other things, plaintiff was terminated for exercising her right to free speech (id.). The original defendants to this suit were the Director and members

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1/ References will be limited to information contained in the Petition For A Writ of Certiorari, designated herein as "Pet. for Cert." and to the Petition's appendix designated herein as "A".

of the Board of Directors of New Perspective School, Inc., sued individually and in their official capacities; Francis X. Bellotti sued in his capacity as Chairman of the Massachusetts Committee on Criminal Justice; Robert J. Kane, sued in his capacity as Executive Director of the Massachusetts Committee on Criminal Justice; and certain federal officials in their capacity as officials of the United States Law Enforcement Assistance Administration (Pet. for Cert. 3-4).

On April 12, 1979, the district court allowed the federal defendants' motion to dismiss (Pet. for Cert. 4; A. 10). William Highgas, Jr., defendant Kane's successor as Executive Director of the Committee on Criminal Justice, was subsequently added as a party defendant in

substitution for defendant Kane (Pet. for Cert. 3; A. 19; Fed R. Civ. P. 25(d)(1)).[2/]

Following extensive discovery the state defendants filed a motion for summary judgment which the plaintiff opposed (A. 10). This motion for summary judgment was allowed on April 16, 1980 (id.). Because the district court (Caffrey, C. J.) granted summary judgment on the basis of a conclusion that there was no state action involved in the firing of plaintiff Rendell-Baker, the case was ordered dismissed not only as to the moving parties but as to all remaining defendants

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2/ Defendants Bellotti and Highgas will be referred to as the "state defendants."

(Pet. for Cert. 4). Plaintiff subsequently filed her notice of appeal (A. 10).[3/]

Statement of Facts

New Perspectives, Inc. is a nonprofit Massachusetts corporation operating as an alternative high school for troubled students (A. 3). The School is located on privately owned property in the Town of Brookline, Massachusetts (id.). It is operated by a Board of Directors,

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3/ The district court (Mazzone, D.J.) denied a motion to dismiss in Klug et al, v. New Perspectives School, Inc. et al., No. 80-1451 a case which also involved the dismissal of teachers from New Perspectives School (Pet. for Cert. 5). The First Circuit Court of Appeals consolidated the Klug appeal with the Rendell-Baker appeal (Pet for Cert. 6). In the same opinion that affirmed the judgment in Rendell-Baker, the court of appeals reversed the order denying defendants' motion to dismiss in Klug (id.). Plaintiffs in the Klug case have joined Ms. Rendell-Baker in filing the instant petition for a writ of certiorari. This brief addresses only Ms. Rendell-Baker's arguments.

no member of which is a government official or was chosen by any government official or governmental body (id.). Approximately fifty students attend the School on a tuition free basis (id.). While students could come to the School through private referral sources or on their own initiative, most are referred by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health or by local school committees under chapter 766 of the Massachusetts Acts of 1972 (id.). Chapter 766 is codified as Mass. Gen. Laws Ann., c. 71B (West Supp. 1981). This law and the regulations promulgated thereunder[4/] establish an entitlement to a publicly-funded education on behalf of children

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4/ 603 Code Mass. Regs. §83 et seq. (1979).

with special education needs. The provisions also set forth a process for evaluating and placing children with such needs in public or private schools. See Mass. Gen. Laws Ann., c. 71B, §§2-5. (West Supp. 1981).

At the time Ms. Rendell-Baker was dismissed, the School received substantial funding from the government (A. 4). In this regard, the vocational education program out of which plaintiff was paid was funded by the federal Law Enforcement Assistance Administration (A. 7) which channeled its funds through the Massachusetts Committee on Criminal Justice (id.). The School was also subject to various governmental requirements (A. 5-6) including approval by the Committee of staff hiring in the School's vocational program (A. 7). This prior

approval was limited to reviewing resumes submitted by New Perspectives in order to ensure that applicants for vocational positions satisfied the qualifications proposed by the School (A. 8). The Committee on Criminal Justice did not interview applicants or exercise any subjective judgment in the hiring process nor did it participate in or impose conditions on the School with respect to termination of New Perspectives' employees (A. 7; 25).

On January 3, 1977 the plaintiff was terminated from her position as vocational counselor at the New Perspectives School, Inc. by Sandra Kohn, Director of the School (Pet. for Cert. 14). Ms. Rendell-Baker had been employed by the School for approximately one year from

January, 1976 to January, 1977 (A. 8). Just prior to her termination, plaintiff had voiced support for reinstitution of a student-staff council through which students could participate in the School's personnel decisions (A. 8). Students had presented a petition seeking reinstitution of the council at a meeting of the School's Board of Directors and had encountered opposition from Director Kohn (id.).[5/]

Plaintiff's protest of her discharge prompted two discreet responses. First, the School appointed a grievance committee to hear the plaintiff's grievances (A. 9). The School did not, however,

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5/ The state defendants have accepted this account of plaintiff's dismissal for purposes of their Motion to Dismiss and/or Summary Judgment.

grant her a formal hearing (id.). Second, a representative of the Committee on Criminal Justice sought, prior to approving a new candidate to fill Ms. Rendell-Baker's position, information concerning the rules and regulations under which the action was taken (id.). While the Committee did not have authority for exercising this oversight (A. 7; 25)[6/] such a response was nevertheless provided and the Committee indicated that it was satisfied.

6/ See p. 7, supra.

SUMMARY OF ARGUMENT

New Perspectives School, Inc. is a private school which contractes with the Commonwealth of Massachusetts to provide statutorily-mandated special education. In providing this education to students placed and funded by the state, the School performes a public function. Under the Supreme Court's public function doctrine, a determination of whether a specific act is subject to constitutional contraints depends upon whether that particular action involves an exercise of a delegated public function.

The specific act which the plaintiff contends is imbued with state action is her dismissal as vocational education teacher at New Perspectives. All parties agree, for the purpose of resolving the

state action issue, that plaintiff was dismissed for advocating student participation in the School's personnel decisions. Thus, the relevant question is whether plaintiff's support of student participation in the hiring and firing of School staff directly relates to the School's public function of providing special education.

This question presents no issue of general importance which would justify the granting of a writ of certiorari. Its resolution would provide little assistance to lower courts confronted with future state action issues involving the delegation of statutorily-mandated special education. A private school delegated a state's special education responsibility might be a state actor with respect to one activity but not another. Each challenged action must be

individually scrutinized in order to determine if the appropriate nexus exists between it and the delegated public function at issue.

The First Circuit's scrutiny of Ms. Rendell-Baker's dismissal resulted in a conclusion that while the School might perform a public function with respect to its student body, it did not perform a public function towards its faculty. This conclusion is supported by the fact that the School's authority over its faculty derives from a contractual relationship of employment, not from state law. Moreover, even if the dismissal of a teacher might, in some instances, involve the exercise of a school's public function, the plaintiff's dismissal did not because it was unrelated to her teaching activities or to the School's

educational responsibilities. Accordingly, the required nexus between the delegated public responsibility for providing special education and termination of the plaintiff was lacking.

The conclusion of the First Circuit is generally supported by decisions of various courts of appeals addressing state and federal action issues in a delegation setting. Where no state action has been found to exist, the challenged activities have tended to involve personnnel matters, like Ms. Rendell-Baker's dismissal, which are collateral to the defendants' performance of public responsibilities. Conversely, where state or federal action has been found to exist, the challenged activities have tended to directly involve the defendants' mode of conducting their

public responsibilities. This latter group of activities is distinguishable from Ms. Rendell-Baker's dismissal which was unrelated to the provision of special education.

ARGUMENT

I. RESOLUTION OF THIS CASE DEPENDS UPON AN APPLICATION OF SETTLED LEGAL PRINCIPLES TO A UNIQUE FACTUAL SITUATION.

Plaintiff petitions for a writ of certiorari to resolve whether and to what extent a private school becomes a state actor when it contracts with the state to provide statutorily-mandated special education. The petition seeks to distinguish this delegation of public responsibility to the private sector from state involvement in private conduct, an issue which has been exhaustively explored in

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) and its progeny. E.g. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

While a distinction between delegation of public responsibility and state insinuation into private conduct may be valid, the Court has already provided a framework through which to analyze state action issues involving the delegation of governmental obligations. Since the application of that framework to the specific facts of this case presents no issue of general import, a grant of certiorari is both unnecessary and inappropriate.[7/]

7/ The First Circuit also applied a Burton/Jackson insinuation test and

(footnote continued)

The Court's mode of analyzing state action issues involving the delegation of governmental obligations is most explicitly set out in Smith v. Allwright, 321 U.S. 649, 663 (1944) wherein the Court concluded that state action did exist with respect to the delegation to the Democratic party of the state's responsibility to conduct primary elections. Rather than subject the Party to constitutional constraints with respect to all of its activities, however, the Court concluded that state

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(footnote continued)

concluded that there was no state action under it. Given this conclusion, the case fails to raise the potentially significant issue of whether the Burton/Jackson test should be applied in the absence of state action under the public function analysis. See Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) (court does not sit to satisfy a scholarly or abstract interest in such issues). Plaintiff, moreover, has not requested the Court to review this issue on certiorari.

action existed only "insofar as [the Party] determines participants in a primary election." See also Terry v. Adams, 345 U.S. 461 (1953). By limiting its holding to matters involving the actual electorial process, the Court made clear that the specific action challenged must itself involve the exercise of a delegated govermental responsibility in order for constitutional safeguards to apply. The Court subsequently characterized its analysis as the public function doctrine. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1977).

In Evans v. Newton, 382 U.S. 296, 299 (1966), the Court also concluded that state action existed in regard to the transfer of a municipal park to private trustees, suggesting that the operation of the park was a function governmental

in nature. Although subsequent decisions of the Court cast doubt on the applicability of the Newton case to the public function doctrine, see e.g., Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 159, n.8, it is significant that the specific action challenged in Newton -- restriction of the park to whites -- related directly to the operation of the park and, hence, to the public function.

Plaintiff suggests that Norwood v. Harrison, 413 U.S. 455 (1973), is also pertinent to state action questions raised by the delegation of public functions to private entities. That case, however, is inapposite to the state action issue before the Court since it involved a direct challenge on equal protection grounds to state support of private schools with racially discrim-

inatory admissions policies. Plaintiffs there did not challenge the private status of the schools on the basis of the state support. Id. at 457-458.

If one applies the public function analysis to the facts of this case, it becomes clear that New Perspectives School would be subject to constitutional provisions only in regard to matters which relate to the School's responsibility to provide special education to students placed and funded by the state. It would not be a state actor in regard to collateral matters which do not bear directly on the School's responsibility to provide publicly-funded and regulated special education. Indeed, plaintiff does not challenge this proposition, arguing instead that her termination relates directly to the School's

performance of its public education responsibilities.[8/] Thus, the dispositive issue before the Court is whether the termination of a teacher for open advocacy of student participation in a private school's general personnel matters is an activity directly related to the school's contracted public function of providing special education.

Given the narrowness of the question presented for review, its resolution would provide little assistance to lower courts confronted with future state action issues involving the delegation of statutorily-mandated special

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8/ Plaintiff acknowledges on p. 20 of her Petition for a Writ of Certiorari that the case "does not raise the question whether a private school becomes a state actor for all purposes when local governments delegate to it their obligation to provide public education."

education, much less other asserted public functions. A private entity delegated the state's special education responsibility might be a state actor with respect to one challenged activity but not another. For instance, review of the present case would be irrelevant to non-teacher termination issues such as school curriculum or library policies arising in the context of a private school setting. Similarly, such review would have minimal relevance to issues involving teacher terminations for reasons other than personnel disputes. Under the public function doctrine previously articulated by the Court, each such action would have to be individually scrutinized to evaluate its relationship to a school's delivery of publicly-mandated and funded education.

This case-by-case application of the previously articulated public function doctrine requires "sifting facts and weighing circumstances,"[9/] an inappropriate task for the Court. See Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) (problems which are episodic or which benefit particular litigants only do not justify the grant of a writ of certiorari); National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) (certiorari is granted only in cases involving principles of public importance); Carter v. Atlantic and St. Andrews Bay

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9/ Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Chalfant v. Wilmington Institute, 574 F.2d 739, 744 (3rd Cir. 1978) quoting Hollenbaugh v. Carnegie Free Library, 545 F.2d 382, 383 (3rd Cir. 1976) ("within the confines of certain guidelines, the presence or absence of state action must be determined on a case-by-case basis.")

Railway Co., 338 U.S. 430, 438 (1979), Frankfurter, J. dissenting (the grant of a writ of certiorari is inappropriate where the case involves no general principle requiring pronouncement but merely its own unique circumstances). Accordingly, the state defendants respectfully submit that resolution of the case does not present an appropriate issue for the Court to review.

II. DECISIONS OF THE FEDERAL COURTS REFLECT THE SUPREME COURT'S MODE OF ANALYZING STATE ACTION IN THE DELEGATION OF PUBLIC FUNCTIONS.

A. The Decision Of The First Circuit Conforms To The Public Function Doctrine.

In requesting that this Court accept review of the case, plaintiff claims that the First Circuit mistakenly employed a mode of analysis more suited to a Burton-type insinuation case than to the delegation case before it.[10/] While it is true that the First Circuit evaluated the extent of actual state involvement in the School's operation, it is true also that the First Circuit considered whether the School performed a public function in providing statutorily-mandated special education and whether plaintiff's termination sufficiently

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10/ Petition For Writ of Certiorari at 25.

implicated that function to render the School a state actor in effectuating the dismissal.[11/] Its conclusion that the state was not subject to constitutional constraints in terminating plaintiff stemmed from a conviction that while the School might perform a public function with respect to its student body, it did not perform a public function towards

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11/ The fact that the First Circuit employed both modes of analysis and arrived at the same result does not detract from the validity of its holding. To the contrary, it is logical that the state would not be extensively involved in matters unrelated to the School's public function of providing special education. See McQueen v. Druker, 438 F.2d 781, 784 (1st Cir. 1971) ("The stronger posture of government supervision present in this case is not unrelated to the fact that the government has chosen to attract the participation of private persons in carrying out a specific governmental purpose.")

its faculty (A-23).[12/] In other words, the First Circuit refused to conclude that state action existed under the public function doctrine because the required nexus between the delegated public responsibility for providing special education and the termination of the plaintiff was lacking.

This lack of nexus accurately reflects the Smith v. Allwright mode of analysis for two reasons. First, as the First Circuit noted, the School's authority over its faculty derives from a contractual relationship of employment, not from state law (id.). Given this derivation, personnel decisions in

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12/ Since the Court applied the public function doctrine and concluded that state action was lacking, it did not have to resolve conclusively whether the provision of statutory-mandated special education by a private school constituted such a function.

general are distinct from decisions involving the student body which relate to education matters.

Second, the underlying reason for the plaintiff's termination -- advocating student participation in faculty appointments and terminations -- was itself a personnel matter rather than an issue bearing directly on the School's provision of special education. In this regard the termination of the plaintiff must be contrasted to the dismissal of a teacher for classroom incompetence which arguably could be related to a school's special education responsibilities. Thus, the First Circuit's holding lies squarely within the analytical framework established by Smith v. Allwright even though a resolution of state action in other types of personnel actions might not.

B. Federal Court Decisions Are Generally Consistent With The Public Function Doctrine.

Defendants are aware of no other federal court of appeals cases which raise state action issues in regard to teacher terminations by private schools providing special education on contract with the state. Accordingly, the First Circuit decision does not conflict with the decision of any other federal court of appeals on the same matter.[13/]

Insofar as related matters are concerned, the First Circuit decision is generally supported by the decisions of the various courts of appeals addressing

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13/ Rule 17 of the Rules of the Supreme Court sets forth various considerations governing review on certiorari. One such consideration listed in Rule 17.1(a) is whether a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter.

state and federal action[14] issues where other governmental obligations are delegated to private entities.[15]

Several of those decisions involve a conclusion of no federal action in

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14/ The same types of considerations are relevant to a conclusion of federal action as are relevant to a conclusion of state action. See Griffith v. Bell-Whitley Community Action Agency, 614 F.2d 1102, 1108 (6th Cir. 1980) (noting that the Burton rationale has been applied to find both state and federal action in a variety of contexts).

15/ The decision is also consistent with an earlier state action case decided by the First Circuit, McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971). There the court concluded that the provision of housing for urban renewal displacees was a governmental function which was being performed by private landlords receiving governmental subsidies to do so. The First Circuit's holding that the landlord's attempted eviction of his tenants constituted state action can be reconciled with the present case since the attempted eviction was directly related to the public function of providing housing for urban renewal displacees.

regard to nonprofit corporations which receive state and federal funds for the purpose of operating anti-poverty programs under Title II of the Economic Opportunity Act of 1964, 42 U.S.C.A. §2781 et seq. (West 1973 & Supp. 1981). In Griffith v. Bell-Whitely Community Action Agency, 614 F.2d 1102 (6th Cir. 1980), employees of a community action agency funded by the federal government pursuant to the Economic Opportunity Act of 1964, claimed that the agency violated their constitutional rights by discharging them because of their opposition to the election of the agency's executive director. Notwithstanding the agency's extensive federal funding and its subjection to an elaborate and pervasive body of federal regulations, the Sixth Circuit concluded that the dismissals did not constitute state action

because the federal government had no control over, nor involvement in, this matter. Griffith at 1109. Thus, as in Smith v. Allwright and in the First Circuit decision below, the court focused on the particular act that was being challenged in order to conclude that federal action did not exist.[16/] Moreover, like the issue here, the challenged act was a personnel dispute which was unrelated to the agency's public purpose of fighting poverty.

Similarly, the Fifth Circuit in Hines v. Cenla Community Action Committee, Inc., 474 F.2d 1052 (5th Cir.

16/ Although the Sixth Circuit focused on the particular act in terms of its nexus to governmental regulations and funding rather than in terms of its nexus to the agency's public function of fighting poverty, such analysis is not inconsistent with Smith v. Allwright or the First Circuit decision below, see p. 25 n.11, supra.

1973) concluded that a community action agency was not a state actor in dismissing the agency's Executive Director. As in Griffith, the agency was funded and regulated by the Office of Economic Opportunity pursuant to Title II of the Economic Opportunity Act of 1964, 42 U.S.C.A. §2781 et seq. (West 1973 & Supp. 1981). Nevertheless, the court determined that the true beneficiaries of the Act were poverty stricken individuals and, accordingly, that plaintiff's right to employment was not based on the federal statute but rather on private contractual rights. 474 F.2d at 1656. This determination mirrors the analysis of the First Circuit below wherein Ms. Rendell-Baker's employment by New Perspectives was found not to derive from state law but from a contractual relationship. The result in Hines,

moreover, represents yet another example of a personnel dispute failing to generate state action in the context of a governmental obligation delegated to a private entity.[17/]

More explicit support for application of the public function doctrine to resolve state action issues in a delegation setting is found in Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974). Perez involved the delegation to a private institution of New York's statutory responsibility to care for

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17/ But see Ginn v. Mathews, 533 F.2d 477 (9th Cir. 1976) finding state action in regard to a community action agency operating a Headstart program under the Economic Opportunity Act of 1964. There the challenged activity was an alleged retaliatory dismissal of employees for union involvement.

neglected and abandoned children. The court characterized this responsibility as a public function and noted that the dependence of the state on private parties was "a factor which tends to establish the intimacy requisite to a finding of 'state action.'" Perez at 766.

Significantly, the Court rejected the notion that:

> every action in which such an institution engages is 'state action.' Rather, appellant argues only that the particular custodial power exercised here in detaining appellant's children constitutes 'state action' because there is a nexus between the public function being performed and the specific acts which are alleged to be objectionable. Id.

Applying this rationale to the facts presented in Perez, the Second Circuit concluded that state action did exist.

This conclusion does not undermine the holding below, however, because in Perez the specific act challenged was a programmatic matter: the detention of two children by a private child care institution without court order or parental consent. Since this activity constituted an exercise of the public function, a nexus clearly existed between the challenged act and the public function being performed. Perez therefore represents the converse of the present case.

An earlier Second Circuit case, United States v. Wiseman, 445 F.2d 792 (2d Cir. 1971), cert. denied, 404 U.S. 967 (1971) also concluded that state action did not exist in regard to the delegation of the state's function of process serving upon private parties.

The two essential elements of the court's analysis were the traditionally public nature of process serving and the fact that the challenged act concerned delivery of false affidavits of service. Wiseman at 796. The court described the act as "directly involv[ing] defendants' mode of conducting this public function . . . not . . . a collateral aspect of the process serving business." Id. Thus, the Wiseman analysis conforms to the public function doctrine and its result, like Perez, is visibly distinguishable from the First Circuit's holding below.

Finally, despite a conclusion of state action, Ross v. Allen, No. 80 Civ. 3422 (RWS) (S.D. N.Y., filed May 6, 1981) (A. 62-84), which plaintiffs describe as the case "most nearly on point," also supports the defendants' position in

opposing the grant of certiorari. The private school in Ross, like New Perspectives, provided special education on contract with the government and was subject to extensive public regulation. The plaintiff in Ross, like Ms. Rendell-Baker, was dismissed from the faculty of the private school. Prior to her dismissal the plaintiff had been employed as a psychologist whose duties included the performance of psychological evaluation, psychotherapy and teaching. Her dismissal stemmed from opposition to an official school directive concerning the indefinite suspension of a child for behavioral problems.[18/] The school

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18/ Ms. Ross informed school officials of the illegality of the suspension action, informed the student's mother of her son's procedural rights, and contacted the Child Advocacy Project of the New York City Board of Education (A. 65).

claimed Ms. Ross had improperly contacted the Board of Education, an "outside agency" concerning the school's activities and had assumed an inappropriate role as a child advocate (A. 66).

The critical distinction between Ross and the present case lies in the nature of the challenged activity and its relationship to the public function of providing special education pursuant to a governmental contract.[19/] In Ross the psychologist's actions were directly related to the provision of special education; her involvement

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19/ The court in Ross specifically characterized its analysis of state action as the "state-function" approach and justified taking this approach because under New York law, the state had a duty to provide for the educational needs of handicapped children which could be discharged through contracts with private institutions (A. 69).

stemmed from concern about the interruption in the child's special education. Thus, rather than a dismissal over a matter of general administrative policy as is at issue here, the dispute in Ross directly implicated the school's public function.

This distinction not only reconciles the results of the two cases but underscores the critical nature of the factual context in which the delegation of a public function is asserted. Because of the significance of the factual context, the granting of certiorari here would provide little guidance to resolving future cases involving the delegation of public functions whether or not they involve special education. To the extent that the public function doctrine enunciated in Smith v. Allwright remains viable, the facts of each case would

have to be individually assessed to determine whether the challenged activity relates to a delegated public function. As this Court has previously recognized, it should not involve itself in such a monitoring role.

CONCLUSION

For the reasons stated, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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No. 80-2102

In the Supreme Court of the United States

OCTOBER TERM, 1980

SHEILA RENDELL-BAKER,
PETITIONER,

v.

SANDRA KOHN, ET AL.,
RESPONDENTS;

WAYNE KLUG, ET AL.,
PETITIONERS,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTION PRESENTED

Is the Public Function Doctrine of State Action Applicable or Appropriate to a Private School Because It Provides Educational Services to Special Needs Children at Public Expense?

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In the
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OCTOBER TERM, 1980

No. 80-2102

SHEILA RENDELL-BAKER,
PETITIONER,

v.

SANDRA KOHN, ET AL.,
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v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Statement of the Case

This Brief in Opposition is filed on behalf of the respondent *New Perspectives School, Inc.* and the individual members of the School's Board of Directors who were sued in their individual and official capacities. For all purposes, respondents will be referred to collectively.

The two cases which petitioners seek to have reviewed involve claims by former staff members of the New Perspectives School, Inc. Petitioners' contention below was that, in each case, they were discharged based upon exercise of their First Amendment rights and without due process. The United States Court of Appeals for the First Circuit, after consolidating the two cases because the issues presented were so closely related,[1] held that respondents, in discharging petitioners, did not act "under color of state law" and entered appropriate orders dismissing the cases.[2]

For purposes of this Court's consideration of the petition for a writ of certiorari, respondents rely upon and incorporate by reference the Court of Appeals' statement of the case. 641 F. 2d at 16-21.

Reasons for Denying the Writ

I. The Public Function Doctrine Is Not Applicable or Appropriate to This Case.

Petitioners do not ask for review of the First Circuit's holding in this case on the grounds that the lower court incorrectly analyzed this Court's holdings in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). Their claim is that the First

[1] Petitioners here raise no issue independently relevant to one or the other case, and respondents will treat the issues raised in the same fashion. Presumably, any issue peculiar to the *Rendell-Baker* matter only was satisfactorily disposed of by the lower court. *Rendell-Baker* v. *Kohn*, and *Klug* v. *New Perspectives School, Inc.*, 641 F. 2d 14, 27-28 (1st Cir. 1981). (The First Circuit's opinion will be cited hereafter as *Klug*).

[2] The U.S. District Court's decision in *Rendell-Baker* was affirmed, while the *Klug* matter was reversed and remanded with directions that judgment be entered dismissing the complaint.

Circuit, though reading the *Burton-Moose Lodge-Jackson* line of cases correctly and consistently with other circuits which have addressed the problem, failed to apply the appropriate doctrinal framework to these circumstances. The premise upon which they seek review here is that this is a case of State delegation to respondents of a "public function" so closely associated with the State, so "traditionally exclusively reserved to the State"[3] that respondents must assume the constitutional obligations of the State. From this premise, petitioners conclude that respondents become a "public entity", not for all purposes, but only "in connection with activities directly related to the manner in which it performs that delegated function", including dismissal of its teachers. Petitioners' Brief, pp. 20-21.

The petition for a writ of certiorari should be denied because this Court's public function doctrine ought not to be applied to these circumstances. The doctrine has always been a severly circumscribed one, made more so in recent years. Indeed, this Court has already declined to include within the scope of the public function doctrine the particular function petitioners seek to place within its ambit, namely secondary education. Moreover, the notion that the public function doctrine, when applied, may permissibly result in a kind of "limited public function" application has never been adopted by this Court for the very good reason that it it impossible to set those limits and is wholly inconsistent with the doctrine itself. Finally, the public function doctrine is concededly not susceptible of definition and an unsatisfactory test that ought not to be expanded.

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[3] *Jackson*, 419 U.S. at 352.

A. *The Public Function Doctrine Has Been Limited to a Narrow Range of Activities Under Unusual Circumstances.*

Petitioners' theory of state action is premised upon the idea that the State has wholly delegated to respondents a "public function". They do not contest, as the First Circuit held, that there is not "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself". *Jackson*, 419 U.S. at 351. Nor do they contest their failure to meet *Burton's* "symbiotic relationship" test, a relationship between State and private entity "so intertwined that the State will be held responsible for conduct with which it had no direct connection". *Downs* v. *Sawtelle*, 574 F. 2d 1, 9 (1st Cir. 1978). Rather, they propose that precisely because the state has contracted with respondents to discharge, in part, its responsibility to provide special education to its special needs children, respondents are necessarily performing a "public function" at least "in connection with activities directly related to the manner in which it performs that delegated function". Petitioners' Brief, pp. 20-21. While this novel approach has some surface appeal, it wholly ignores the fact that it has never been applied in the circumstances present here.

Largely because the public function doctrine is so amorphous and so capable of subjective application, it has always been severely circumscribed. The doctrine was first established in *Smith* v. *Allwright*, 321 U.S. 649 (1944), *Marsh* v. *Alabama*, 326 U.S. 501 (1946) and *Terry* v. *Adams*, 345 U.S. 461 (1953). At the time, it appeared to mean that if a private entity acted like the State, it would be treated like it at least for purposes of the Fourteenth Amendment.[4] From its inception,

[4] In *Marsh*, this Court held that the first amendment rights of one distributing religious literature applied to the privately owned streets of a company town, emphasizing that the company had treated the streets as public and had not restricted access to

the theory was restricted to a few select activities: maintenance of a company town, *Marsh*; conduct of party nominating procedures, *Smith*; conduct of elections for public office, *Terry*; provisions for parks, *Evans* v. *Newton*, 328 U.S. 296 (1966);[5] and private shopping centers so long as the activity (labor picketing) was related to the purpose for which there was public access. *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).[6]

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them. While this Court never used the term, what seemed to be at work was "a kind of public easement based on estoppel". *Klug*, 641 F. 2d at 24-25, fn. 20.

[5] It should be noted that it is not at all clear that it was the governmental character of the provision of parks which formed the basis for the Court's decision in *Newton*. In *Newton*, the Court was presented with a unique fact situation. In its opinion, the Court emphasized that for decades prior to institution of the suit, the City had totally maintained the "whites only" park as a public facility, and found that, even though just prior to suit, private parties had replaced the City as trustee of the park, the City still exercised total control over and maintenance of the park. Indeed, this Court has stated that: "We think *Newton* rests on a finding of ordinary state action under extraordinary circumstances. The Court's opinion [in *Newton*] emphasizes that the record showed 'no change in the municipal maintenance and concern over this facility', after the transfer of title to private trustees. That transfer had not been shown to have eliminated the actual involvement of the City in the daily maintenance and care of the park". *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 159, fn. 8 (1978).

[6] As will be fully discussed, *infra*, *Logan Valley* is no longer good law, having been overruled by *Lloyd Corporation* v. *Tanner*, 407 U.S. 551 (1972) and *Hudgens* v. *N.L.R.B.*, 424 U.S. 507 (1976).

Lower courts have applied the theory in only two other areas: A federal district court in Alabama extended *Marsh* and *Newton* to cemeteries (*Terry* v. *Elmwood Cemetery*, 307 F. Supp. 369 (D. Ala. 1969)) and a number of lower federal courts have applied the theory to the unique properties of the National Collegiate Athletic Association. *Parish* v. *N.C.A.A.*, 506 F. 2d 1028 (5th Cir. 1975); *Howard University* v. *N.C.A.A.*, 510 F. 2d 213 (D.C. Cir. 1975); *Associated Students, Inc.* v. *N.C.A.A.*, 493 F. 2d 251 (9th Cir.

Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), signalled this Court's view that the public function doctrine was a limited one, susceptible to quite circumscribed application. In *Jackson*, where beneficiaries of a monopolistic private utility service sought due process protections before service shut-downs, this Court expressly limited the doctrine to those cases where the private entity exercised "powers traditionally exclusively reserved to the state". 419 U.S. at 351. This Court, characterizing the public function "limited line of cases" as eliciting criteria "not susceptible of definition and form[ing] an unsatisfactory test",[7] expressly rejected any expansion of the precedent "into a broad principle that all business 'affected with the public interest' are state actors in all their actions". 419 U.S. at 353.

As a viable test of state action, the public function doctrine has continued its eclipse ever since *Jackson*. In *Hudgens* v. *N.L.R.B.*, 424 U.S. 507 (1976), the Court curtailed the doctrine's application to free expression on private property and expressly overruled the *Logan Valley* case in doing so.

1974); *Brockton* v. *N.C.A.A.*, 366 F. Supp. 1152 (D. Mass. 1973). For a comprehensive survey see *Cronin*, "Private Hospitals That Receive Public Funds Under The Hill-Burton Program: The State Action Implications", Vol. 12, No. 3, New England Law Review 525 (1977); *Nolte*, "State Action After *Jackson* v. *Metropolitan Edison Co.*: Analytical Framework for a Restrictive Doctrine", 81 Dickinson Law Review 315 (1977); *Note*, *State Action and the Public Function Doctrine: Are There Really Public Functions?* 13, University of Richmond Law Review 579 (1977). See, for example, lower federal court cases refusing to apply the doctrine to mortuaries and hospitals: *Watkins* v. *Mercy Medical Center*, 520 F. 2d 854 (9th Cir. 1975); *Scott* v. *Eversole Mortuary*, 522 F. 2d 1110 (9th Cir. 1975); *Schlein* v. *Milford Hospital*, 561 F. 2d 427 (2nd Cir. 1977).

[7] *Jackson*, 419 U.S. at 353, citing with approval the language of *Nebbia* v. *New York*, 291 U.S. 502, 536 (1934) which rejected a substantive due process claim on the basis of the vagaries of terms such as "affected with a public interest" and "clothed with a public use".

Hudgens affirmed that the doctrine had little application except in unusual circumstances such as *Marsh's* streets of a company town and *Smith's* party nominating procedures. The Court adopted Justice Black's long-held view that the public function doctrine applied only to where the entity "took on all the attributes of a town" and apparently to nothing else. *Marsh*, 326 U.S. at 502.

Two years later, when this Court confronted the "public function" of dispute resolution in *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978), the doctrine's application was again rejected, the Court reiterating that the *Marsh* and *Smith* cases, unlike the case before it, had "in common the feature of exclusivity". 436 U.S. at 159.

Taking *Marsh*, *Jackson*, *Hudgens* and *Flagg Bros.* together, the circumscription of the doctrine is harsh and literal. Only where the delegated function has been traditionally *and* exclusively reserved to the State will the doctrine be considered. Since such a scenario is rare the doctrine will be infrequently applied.[8] "While many functions have been traditionally performed by governments, very few have been exclusively reserved to the State". *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978).

B. *Neither Education Nor Special Education Fall Within the Ambit of the Doctrine.*

While it may indeed be true that education may be one of those areas "which have been administered with a greater degree of exclusivity"[9] than was *Flagg Bros.'* dispute resolution function, it is not of a degree to give rise to State action.[10]

[8] For example, *Jackson's* majority suggested that the case might be different had Pennsylvania delegated the eminent domain function, a power "traditionally associated with sovereignty", and unquestionably within the State's exclusive domain. *Jackson*, 419 U.S. at 353.

[9] *Flagg Bros.*, 436 U.S. at 163.

[10] *Flagg Bros.* expressly declined to express a view on this point.

Education "has never been a state monopoly in this country, even at the primary and secondary levels". *Powe* v. *Miles*, 407 F. 2d 73, 79 (2d Cir. 1968). As the *Jackson* court stated, this Court has long since rejected the application of the public function doctrine to education:

> . . . "It is difficult to imagine a regulated activity more essential or more 'clothed with the public interest' than the maintenance of schools, yet we stated in *Evans* v. *Newton*, 382 U.S. 296, 300, 86 S. Ct. 486, 489, 15 L. Ed. 2d 373 (1966):
>
> > 'The range of government activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems' " *Jackson*, 419 U.S. at 353, fn. 9.

Moreover, and despite petitioners' assertions to the contrary, there is no fundamental distinction in principle between the Commonwealth's scheme providing public school education and the more recent scheme creating publicly supported special education. Massachusetts has taken upon itself the responsibility of providing a sufficient number of public schools for all its children. These residents and their families are not only assured but required to obtain an education. The State has also taken upon itself the responsibility of providing a publicly supported education for students with special needs. Compare 71 M.G.L., §1 with 71B M.G.L., §§2, 3. But neither obligation creates the expectation or the requirement

that the State assume *exclusive* responsibility.[11] It goes without saying that children in the Commonwealth may go to private schools to fulfill their statutory obligation. So too may children with special needs—at their own expense and *not* within the statutory framework of Chapter 766.

Respondents, like other private and parochial schools are, an important part of the educational system in this Commonwealth. They aid the State in discharging its statutory responsibility to provide compulsory education to all children. Yet to draw a line of public function application so as to include New Perspectives School and exclude other traditional private and parochial schools has no rational basis and only serves to highlight the weakness of the doctrine itself. Creation of a publicly supported education for students with special needs did not transform the private provider into a state actor any more than creation of a public school system transformed the traditional private or parochial school into a state actor.

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[11] Petitioners argue that statutory creation of a right to special education creates an expectation *and* entitlement to such a State supported service, with attendant constitutional obligations which cannot be delegated and are just as worthy of "recognition and fulfillment" as traditional and exclusive public functions. Petitioners' Brief, pp. 34-35, fn. 14. The assertion, however, ignores the reality that it is the tradition and exclusivity tests that must be met. Moreover, when the state creates an entitlement, it is the *State* which has the right to define the expectations surrounding that entitlement. This Court should give great deference to the Commonwealth's failure to afford teachers in private special education programs *any* of the procedural rights afforded all public school teachers. *Bishop* v. *Wood*, 426 U.S. 341 (1976); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Finally, throughout much of their argument, but particularly in their footnote 14 and at pages 52-59, petitioners suggest an analysis which might be appropriate if the question of whether they were denied due process were at issue here. This question cannot even be addressed, however, unless it is found that respondent school acted under color of state law when it dismissed petitioners.

Even if special education is seen as having distinctive qualities more closely identifiable with a "public function" than education by private or parochial schools, such a function still fails to meet the tradition and exclusivity tests. The mere existence as well as the provisions of Chapter 766 establish that special needs education in the Commonwealth has never been "traditionally associated with sovereignty". *Jackson*, 419 U.S. at 353. Indeed, it is precisely because public schools had *not* traditionally educated special needs children that Chapter 766 was enacted.[12]

Secondly, special education is not the exclusive domain of the State. A special needs educational plan devised for a child is "subject to the consent of the parent or guardian affected thereby" M.G.L., Ch. 71B, §4. If a child's parents do not agree with the educational plan devised by the State, they are free to provide their child, at their own expense, with an alternative educational program.[13] Alternatively, they may decide to keep their child in a regular public school setting or to opt for a public school special needs program not recommended by the school committee. Thus, by statutory definition and practical effect, special needs education is a jointly public and private function and cannot be said to be within the State's exclusive domain.

Finally, recognizing that localities not only did not have the exclusive facilities for special needs education but often did not have any such facilities, the Massachusetts legislature provided that the localities could contract with private schools

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[12] As the First Circuit stated, "[I]t is only recently that public school systems have assumed any responsibility for children with special needs; until a few years ago such children were routinely excluded from public schools". 641 F.2d at 26.

[13] There is also an elaborate administrative process for ironing out differences between parents and schools over recommended choices since there is a fundamental tension between the child's needs and the fiscal and educational capacity of the school system to meet those needs.

such as respondents. See M.G.L. Chapter 71B, §5. The legislature's goal in this regard was to ensure quality special education regardless of public availability. By so doing, it cannot be said to have thereby implicitly expanded the traditional constitutional constraints of the public school system upon every private school that accepted a special needs child. Were this the case, "each of the various kinds of regulations to which the school is subject would apply as well to a private institution which contracted with the state to educate one student or to conduct one small program in return for small amounts of funds". *Klug*, 641 F. 2d at 25.

C. *The Public Function Doctrine Cannot Be Applied To Render a Private Entity's Conduct Public for Some Purposes and Private for Others.*

Petitioners' assertion that application of the doctrine to a private school like respondents' is permissive because it will apply only "in connection with activities directly related to the manner in which it performs that delegated function"[14] is wholly without merit. This Court, in all its operative opinions in the area, has always applied an "either-or" test: either the private actor is a state actor *for all purposes* or a private actor *for all purposes*. See *Smith*, *Marsh*, *Burton*, *Moose Lodge*, *Jackson* and *Hudgens*, *all supra*. This is so for the very obvious reason that the Fourteenth Amendment has not and cannot be so glibly bifurcated. It was precisely this approach of applying the public function doctrine depending upon the relationship of the activity to the public function that resulted in the express overturning of *Logan Valley*. Because there was room to distinguish the labor picketing in *Logan Valley* from the anti-war demonstration in *Lloyd* on the grounds that the former was related to the purpose for which the shopping center was open to the public while the latter was not, *Hudgens* ex-

[14] Petitioners' Brief, pp. 20-21.

pressly disposed of *Logan Valley*. See *Hudgens*, 424 U.S. particularly at 518 *et seq*. The rationale of *Hudgens* is controlling here. Just as the content of the speech in the shopping center cases could not transform the shopping centers into state actors, the content of the teachers' speech here cannot change respondent into a state actor.[16] To distinguish, as petitioners urge, between teacher criticism of educational policy and teacher complaints about inadequate parking facilities (the former transforming respondent to a state actor while the latter does not),[17] is to engage in precisely the subjective value judgments that the public function doctrine rejects. Thus, for example, petitioners presumably would not argue that anti-war speech by teachers in the classroom is protected, as this form of expression bears no direct relationship to the special education function. In this light, the "direct relationship" approach to the public function doctrine is no more than a guise for the claim that one form of expression is more worthy of protection than another.[18] But either the First and Fourteenth Amendments apply to this case or they do not: "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content". *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).[19]

[16] As *Hudgens* aptly asserted, the First and Fourteenth Amendments would not permit "control of speech within such a center to depend upon the speech's content". 424 U.S. at 520.

[17] Petitioners' Brief, p. 21.

[18] The First Circuit did recognize a distinction when the public function concept was asserted by beneficiaries for whom services are provided since "the school's action *towards them*", may be construed as taken "under color of" state law. 641 F. 2d at 26. This approach is, in the last analysis, more properly within the *Jackson* nexus analysis. Were this language to be read as drawing a line for application of the public function analysis, respondent would respectfully disagree with both this statement and the First Circuit's footnoted references to cases which hint at a lesser state action standard where claims of discrimination rather than due process are alleged. 641 F. 2d at 26, fn. 21.

[19] Cited with approval in *Hudgens*, 424 U.S. at 520.

In summary, there is no reason in precedent or principle to extend the public function doctrine to this case. Respondents have attempted to demonstrate the dangers of adopting petitioners' more expansive approach. Yet no better articulation of these pitfalls can be found than Mr. Justice Harlan's presciently applicable dissenting opinion in *Evans* v. *Newton*:

> "More serious than the absence of any firm doctrinal support for this theory of state action are its potentialities for the future. Its failing as a principle of decision in the realm of Fourteenth Amendment concerns can be shown by comparing—among other examples that might be drawn from the still unfolding sweep of governmental functions—the 'public function' of privately established schools with that of privately owned parks. Like parks, the purpose schools serve is important to the public. Like parks, private control exists, but there is also a very strong tradition of public control in this field. Like parks, schools may be available to almost anyone of one race or religion but to no others. Like parks, there are normally alternatives for those shut out but there may also be inconveniences and disadvantages caused by the restriction. Like parks, the extent of school intimacy varies greatly depending on the size and character of the institution.
>
> "For all the resemblance, the majority assumes that its decision leaves unaffected the traditional view that the Fourteenth Amendment does not compel private schools to adapt their admission policies to its requirements, but that such matters are left to the States acting within constitutional bounds. I find it difficult, however, to avoid the conclusion that this decision opens the door to reversal of these basic constitutional concepts, and, at least in logic, jeopardizes the existence of denominationally restricted schools while making of every college entrance rejection letter a potential Fourteenth Amendment question.

"While this process of analogy might be spun out to reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though parallelling fields of governmental activity, the example of schools is, I think, sufficient to indicate the pervasive potentialities of this "public function" theory of state action. *It substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and amorphous as it is far-reaching. It dispenses with the sound and careful principles of past decisions in this realm. And it carries the seeds of transferring to federal authority vast areas of concern whose regulation has wisely been left by the Constitution to the States."* *Evans* v. *Newton*, 382 U.S. at 321-2, Harlan, J., dissenting (emphasis added).

II. There Is No Conflict Between the Decision of the First Circuit and the Decisions of Other Circuit Courts.

Petitioners rely upon two Circuit Court decisions, *Perez* v. *Sugarman*, 499 F. 2d 761 (2d Cir. 1974), and *Ginn* v. *Matthews*, 533 F. 2d 477 (9th Cir., 1976), to support their contention that the First Circuit's application of the public function theory of state action is in conflict with the treatment accorded that theory by the Second and Ninth Circuits.[20] But a careful reading of the three cases makes it clear that there is no conflict among the Circuits.

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[20] Petitioners also assert a conflict between the First Circuit decision and a decision from the Southern District of New York, *Ross* v. *Allen*, No. 80 Cir. 3422 (RWS) (S.D.N.Y., filed May 6, 1981). Since a conflict between a District Court opinion and a Circuit Court opinion cannot be used to justify this Court's intervention and since the *Ross* Court relies for its result almost solely on *Perez* v. *Sugarman*, the Second Circuit decision which petitioners contend is in conflict with the First Circuit, respondents will discuss only the alleged conflicts between the Circuit Court opinions.

There is no conflict between the First Circuit's opinion in this case and the Second Circuit's opinion in *Perez* v. *Sugarman*, 499 F. 2d 761 (2 Cir. 1974). In *Perez*, the plaintiff challenged New York State's detention of her children in a private child care institution, pursuant to a New York statute. The State had taken legal custody of her children, and plaintiff alleged that this was done without due process of law. It was the State's subsequent detention of the plaintiff's children which the Second Circuit found to be a public function. The Second Circuit reasoned that the state statute which authorized the state to take custody of the children and provide for their needs through different types of institutions, including private child care institutions, transformed the care of such children into a public function. In the first place, the validity of the *Perez* Court's reasoning that an activity can become a public function whenever a state chooses to take some responsibility for that activity is seriously in doubt. *Perez* was decided before this Court reiterated in *Jackson* that an activity must be traditionally and exclusively reserved to the State before it can be considered a public function. *See, Player* v. *State of Alabama Dept. of Pensions & Security*, 400 F. Supp. 249 (MD Ala. 1975), *aff'd* 536 F. 2d 1385 (5 Cir. 1976). In addition, the function under consideration in *Perez* — the involuntary detention of children — could indeed be construed as one of those few activities both traditionally and exclusively performed by the state, quite apart from any statutory delegation. Moreover, the activity challenged by the plaintiff in *Perez* — the detention of her children — was the exact activity which the Court found to be the public function. *Perez*, 479 F. 2d at 766. In this case, it is not the State's provision of special needs education which is being challenged, but, rather, the dismissal of teachers who chose to teach special needs children in a private school rather than a public school setting. Thus, contrary to petitioners' assertion that a finding of state action here would not require an extension beyond the limits sug-

gested in Perez,[21] a finding here that a private school's dismissal of its teachers constitutes state action would represent a significant extension of the public function concept into the " 'collateral aspect[s] of' " that function.[22] *Perez*, 499 F. 2d at 766, quoting *United States* v. *Wiseman*, 445 F.2d 792, 796 (2 Cir.) *cert. denied*, 404 U.S. 967 (1971). *Accord*, *McQueen* v. *Druker*, 428 F. 2d 781 (1 Cir. 1971).

Nor is there a conflict between the First Circuit's decision and the Ninth Circuit's opinion in *Ginn* v. *Matthews*, 533 F. 2d 477 (9 Cir. 1976). The *Ginn* Court held only that an ostensibly private community action agency which was organized to administer the programs of the Federal Office of Economic Opportunity could be charged with the responsibility of a state actor, at least where the federal government imposed numerous restrictions on that agency's operation, including restrictions on the agency's ability to dismiss employees, the activity which was challenged by the plaintiffs. That holding is inapplicable here because the facts of the two cases differ in at least two important respects. First, the respondent school was not organized for the sole purpose of administering a governmental program, as was the community action agency.[23] Secondly, in *Ginn*, federal regulations required a certain composition of the Headstart Policy Council, the body which had final authority over the hiring and firing of the agency's staff. Here, no governmental agency asserted any control what-

[21] Petitioners' Brief, p.44, fn.18.

[22] Note that the First and Second Circuits' limitation of the public function theory of state action to those cases where the very activity challenged is the public function is consistent with this Court's holding under other theories of state action that there must be a nexus between the activity challenged by the plaintiff and the state action.

[23] While the record itself is silent as to the history of the school, as the First Circuit noted, counsel for the school did indicate that the school was set up initially with private funds. *Klug*, 641 F. 2d at 17, fn. 1.

soever over the hiring and firing of school staff; those decisions were left solely to the discretion of the respondent school. Because of these differences between the two cases, a conflict cannot be considered to exist between the First and Ninth Circuits.

Petitioners have made the mistake of assuming that there must be a conflict in this area merely because the courts reach different results when considering the question of state action. However, "...this apparent disarray is to be expected since '[o]nly by sifting facts and weighing circumstances [of each case] can the non-obvious involvement of the state in private conduct be attributed its true significance.' " *Perez*, 479 F. 2d at 764, citing *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). As can be seen from the above discussion, the circuit courts do consistently apply the same tests when "sifting" and "weighing" these circumstances and therefore, there is no need for this Court to again articulate these same tests.

III. There Is No Conflict Between the Opinions of This Court and the Decision of the First Circuit.

Petitioners contend that there is a "conflict in principle" between the First Circuit's decision, and the opinions of this Court. As the above discussion makes clear, not only is there no conflict between this Court's decisions and the First Circuit's opinion, but the First Circuit in this case has carefully applied the settled principles of state action analysis which have been enunciated by this Court.

Petitioners' reference to *Norwood* v. *Harrison*, 413 U.S. 455 (1973) is misleading and, at best, irrelevant. The *Norwood* plaintiffs sued the state to enjoin the operation of a state program which purchased textbooks for children in private schools even if those schools engaged in racial discrimination. By providing this textbook aid, the *Norwood* Court found that

the state significantly aided the organization and continuation of a separate system of private, discriminatory schools. State action was not an issue in that case because the private schools were not named as parties to the suit. The appropriate case to consider the significance of motive versus effect in a state action analysis is *Evans* v. *Newton*. There, as the First Circuit noted, this Court looked to the motive for the city's delegation of its trustee duties over the park to private parties, and, finding that the city's purpose for the delegation was to evade constitutional requirements, then looked beyond the formal labeling of the park as private for other indicia of state involvement. Once the court found those other indicia of state involvement, the court found state action. The lesson of *Newton* is that courts may look behind a private entity to consider the presence of a discriminatory motive for its creation and then, if it so finds, look further for state "insinuation". "Should a public institution be placed in private hands with the actual purpose of evading constitutional requirements, the courts may look beyond the formal structure of the institution to find other indicia of state involvement". *Klug*, 641 F. 2d at 23. There is, therefore, no independent significance to motive other than as a triggering mechanism to allow the Court to look for state involvement behind an ostensibly private actor. *Accord*, *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974). Here, both motive and effect correctly played no part in the First Circuit's analysis. The Court needed no threshold finding of discriminatory motive to look for state involvement in the respondent school.

Finally, petitioners argue that the First Circuit's opinion conflicts in principle with decisions of this Court on the question of standing. Again, this argument is irrelevant to the question at hand. Simply put, this case raises the question of whether respondents are proper defendants, not whether peti-

tioners would have been the proper plaintiffs to bring suit against a defendant who was acting under color of state law.[24] There is, therefore, no conflict, real, or in principle, between the decisions of this Court and the First Circuit.

Conclusion

The First Circuit correctly applied settled principles of this Court in carefully analyzing petitioners' state action claims. That Court gave little consideration to the public function doctrine, recognizing as this Court has, the doctrine's generally limited scope and inappropriate application to circumstances like those here.

The issue presented to the First Circuit was an important one. But that Court's holding was consistent with long standing precedents and principles of this Court and not in conflict with the analytical framework of the other circuits. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[24] When petitioners state that the First Circuit suggested that they lacked standing to challenge their dismissals on First Amendment grounds because they were not "intended beneficiaries of the service for which the state had contracted with the school" (641 F. 2d at 26), they confuse state action "standing" with first Amendment standing. The First Circuit was clearly addressing state action when it made this remark, suggesting a greater significance to "beneficiaries" making state action claims. Nothing in the lower Court's opinion remotely suggests that that Court took any position on First Amendment standing. The issue was not before the First Circuit and is not before this court. If it is to be addressed at all, it can only be after state action renders that Amendment applicable. See footnote 11 above.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

SHEILA RENDELL-BAKER,
PETITIONER,
v.
SANDRA KOHN, ET AL.,
RESPONDENTS,

WAYNE KLUG, ET AL.,
PETITIONERS,
v.
NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to The United States Court of Appeals For The First Circuit

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I

QUESTION PRESENTED

Is an ostensibly private school, to which local governments have delegated their statutory obligation to provide public education to special needs children at public expense and which is subject to extensive state regulation, subject to any constitutional constraints in connection with the provision of such education?

II

PARTIES BELOW

The Court of Appeals for the First Circuit consolidated these two appeals from the District Court for the District of Massachusetts. In No. 80-1328 below, the plaintiff-appellant was Sheila Rendell-Baker; the defendants-appellees were New Perspectives School, Inc., Sandra Kohn (individually and as director of the school), the members of the Board of Directors of the school (individually and in their official capacities),[1] Francis X. Bellotti (as Chairman of the Massachusetts Committee on Criminal Justice), and William Highgas[2] (as Executive Director of the Massachusetts Committee on Criminal Justice). In No. 80-1451 below, the plaintiffs-appellees were Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca; the defendants-appellants were New Perspectives School, Inc., Sandra Kohn (individually and as director of the school), and the members of the Board of Directors of the school (individually and in their official capacities).[3]

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[1] The individual members of the school's Board of Directors named in the *Rendell-Baker* complaint were Susan Alford, John Businger, Jackie W. Cooper, Stephen B. Goldenberg, Rodney Jackson, Joanne Neiman, James Schlesinger, Rina Wald Spence, Tonia Yee, and Edward Zarsky.

[2] William Highgas was substituted as a named party after he succeeded Robert J. Kane, who was originally named in the complaint, as Executive Director of the Massachusetts Committee on Criminal Justice.

[3] The individual members of the school's Board of Directors named in the *Klug* complaint were James W. Schlesinger, Stephen B. Goldenberg, Joseph Gartner, Joanne Neiman, David Bachrach, Rodney Jackson, Rina Wald Spence, Susan Alford, Rhoda Goodwin, Rina Hamberg, Tonia Yee, and Edward Zarsky.

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In the
Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2102

SHEILA RENDELL-BAKER,
PETITIONER,

v.

SANDRA KOHN, ET AL.,
RESPONDENTS,

WAYNE KLUG, ET AL.,
PETITIONERS,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to
The United States Court of Appeals
For The First Circuit

BRIEF FOR PETITIONERS

Opinions and Judgments Below

The opinion of the court of appeals for both cases, as consolidated on appeal, is reported at 641 F.2d 14 (1st Cir. 1981) and appears in the Petition for Certiorari Appendix [hereinafter "P.A."] at 1-26. The Memorandum and Order of the District Court for the District of Massachusetts in *Rendell-Baker* v. *Kohn, et al.*, No. 80-1328 below, is reported at 488 F. Supp.

764 (D. Mass. 1980) and also appears in the Petition for Certiorari Appendix. P.A. 27-39. The April 7, 1980 Memorandum and Order of the District Court for the District of Massachusetts in *Klug, et al.* v. *New Perspectives School, Inc., et al.*, No. 80-1451 below, is not reported and appears in the Petition for Certiorari Appendix. P.A. 40-57.

The judgment below in *Rendell-Baker* appears in the Petition for Certiorari Appendix. P.A. 58-59. The judgment below in *Klug* appears in the Petition for Certiorari Appendix. P.A. 60-61.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered in both appeals below on February 12, 1981. On May 4, 1981, this Court granted the petitioners' motion for an extension of time until June 12, 1981, within which to petition for certiorari. *See* 28 U.S.C. § 2101(c) (1976). The petition for certiorari was filed on June 12, 1981, and it was granted by an order dated October 13, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

Constitutional, Statutory, and Regulatory Provisions

The following constitutional, statutory, and regulatory provisions are set out hereto in Appendix A:

United States Constitution, Amendment I;

United States Constitution, Amendment XIV, Section 1;

Massachusetts Constitution, Declaration of Rights, Article VII;

United States Code, Title 42, Section 1983;

Massachusetts General Laws, Chapter 71B, Sections 1-5, 9, 10;

603 Code of Massachusetts Regulations, Section 28, Paragraphs 322.2, 502.4(i), 804.0-804.6 (1979).

Statement of the Case[4]

On October 13, 1981, the Court granted the petition for a writ of certiorari to review these two cases which involve closely-related issues and which were consolidated on appeal by the United States Court of Appeals for the First Circuit.

Petitioner in the first case is Sheila Rendell-Baker, a former teacher and vocational counselor at the New Perspectives School, Inc. [hereinafter, the "School"], one of the respondents herein. Ms. Rendell-Baker filed her complaint on July 28, 1977. She alleged, among other things, that the School, acting under color of state law and in violation of her rights under the First, Fifth, and Fourteenth Amendments and 42 U.S.C. § 1983 (1976),[5] dismissed her on January 3, 1977, without notice or hearing, in retaliation for her speech in support of a student petition concerning matters of school policy. J.A. at 76-79. Also named as defendants were members of the School's Board of Directors; Francis X. Bellotti,[6] in his capacity as Chairman of the Massachusetts Committee on Criminal Justice [hereinafter, "MCCJ"];[7] Robert J. Kane, former Executive Director of MCCJ;[8] and certain federal officials, in

[4] In this brief, the following references have been abbreviated as noted:

Appendix A to Petitioners' Brief (herein)	A.
Joint Appendix	J.A.
Petition for Certiorari Appendix	P.A.
Rendell-Baker Record	R.R.
Klug Record	K.R.

[5] Effective December 29, 1979, 42 U.S.C. § 1983 was amended to include the District of Columbia. Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284. Since this amendment did not affect the application of Section 1983 to the cases at bar, all citations and references to Section 1983 herein will be to the 1976 edition of the United States Code.

[6] Mr. Bellotti is also Attorney General of the Commonwealth of Massachusetts.

[7] The MCCJ is a state agency which, among its other duties, distributes funds received from the federal Law Enforcement Assistance Administration. Mass. Gen. Laws Ann. ch. 6, § 156 (West 1976 & Supp. 1981).

[8] While the case was pending in the district court, Mr. William Highgas replaced Mr. Kane as Executive Director and was duly substituted as a defendant. 488 F. Supp. at 785 n.1; P.A. 28 n.1.

their capacity as officials of the Law Enforcement Assistance Administration [hereinafter, "LEAA"].[9] Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343, and 1361 (1976). On April 16, 1980, the district court (Caffrey, C.J.) granted summary judgment in favor of all defendants, on the ground that the School's dismissal of Ms. Rendell-Baker did not involve state action. 488 F. Supp. at 767; P.A. 37-39. Summary judgment was affirmed by the United States Court of Appeals for the First Circuit in an opinion dated February 12, 1981. *Rendell-Baker* v. *Kohn*, 641 F.2d 14 (1st Cir. 1981); P.A. 1-26. With one exception,[10] the statement of facts contained in Part I of the court of appeals' opinion, 641 F.2d at 16-21; P.A. 2-11, is not contested by the parties.[11]

Petitioners in the second case are five former teachers and counselors[12] at the School. These five petitioners claim that they were dismissed on June 16, 1978 for their support of student free speech and educational rights and for their other speech critical of school policy and the administration, all in violation of their rights under the First, Fifth, and Fourteenth Amendments and 42 U.S.C. § 1983 (1976). *See* J.A. 23-29. Suit was commenced against the School and each of its directors on September 12, 1978. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343, and 1361 (1976). On April 7, 1980, the district court (Mazzone, D.J.) denied defendants' motion to dismiss, holding that there was "sufficient involvement by the state to meet the jurisdictional challenge." P.A. 54. The First Circuit Court of Appeals granted leave to file an interlocutory

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[9] The federal defendants were dismissed by order of the district court, R.R. at 230, and petitioners herein do not challenge that dismissal.

[10] *See* note 13, *infra*.

[11] *See* Brief of Respondents Bellotti and Highgas in Opposition to the Petition for the Writ of Certiorari at 4-9 (relying on court of appeals' opinion); Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit at 2 (incorporating by reference the court of appeals' statement of the case).

[12] Petitioners are Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca.

appeal under 28 U.S.C. § 1292(b) (1976) and consolidated the *Klug* appeal with the *Rendell-Baker* appeal. In the same opinion that affirmed the judgment in *Rendell-Baker*, the court of appeals reversed the order denying defendants' motion to dismiss in *Klug*, remanding with directions that judgment be entered dismissing the complaint. 641 F.2d 14; P.A. 1-26.

To understand the nature of petitioners' claims that the School acted "under color of state law" when it dismissed them for their speech, one must recognize the vital role of the School in the provision of public education in Massachusetts. Under Massachusetts law, all special needs students are entitled to receive suitable publicly-funded education under the supervision of the state and local governments. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981); A. 4-9. As the Massachusetts Supreme Judicial Court reaffirmed recently, Chapter 766 of the Massachusetts Acts of 1972, codified at Mass. Gen. Laws Ann. ch. 71B, §§ 1-14 (West Supp. 1981) (occasionally referred to as "Chapter 766") and the regulations promulgated thereunder, 603 Code Mass. Regs. § 28 *et seq.* (1979), create "a comprehensive and complete program of evaluation and placement for children with special education needs." *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 504, 417 N.E.2d 408, 409-10, *quoting Board of Education* v. *Assessor of Worcester*, 368 Mass. 511, 515, 333 N.E.2d 450, 453 (1975).

Under the statute, the school committee of every city, town, or school district must identify all children between the ages of three and twenty-one who, because of temporary or permanent physical or emotional disability, have special educational needs; diagnose and evaluate the special needs of each such child; prepare an individualized educational program tailored to meet those needs; and implement or arrange for the implementation of that individualized program. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981); A. 4-5. Depending upon the needs of the child, the program may con-

sist of as little as additional, in-class assistance or as much as teaching, treatment, and occupational training in a long-term residential school. Mass. Gen. Laws Ann. ch. 71B, § 2 (West Supp. 1981); A. 3-4. School districts may offer special programs themselves through existing public schools or they may contract with private schools to implement such programs. Mass. Gen. Laws Ann. ch. 71B, § 4 (West Supp. 1981); A. 9-10. However, under the regulations, the school committee must provide special education programs in the least restrictive environment possible. 603 Code Mass. Regs. § 28, par. 322.2 (1979); A. 13; *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] at 505-06, 417 N.E.2d at 408.

If the school committee decides to place the special needs child in a private school, there must be a review of that decision at least once every three months to determine if the child can be transferred to a less restrictive environment, such as a regular public school. 603 Code Mass. Regs. § 28, pars. 502.4(i), 804.2 (1979); A. 14. While the child is at a private school, the school committee must monitor the child's educational progress. Mass. Gen. Laws Ann. ch. 71B, §§ 2, 3 (West Supp. 1981); A. 4, 8-9. A private school which accepts a special needs child assigned by a school committee is required to agree to implement the special education program designed for the child and to comply with the detailed regulations promulgated under the statute. 603 Code Mass. Regs. § 28, pars. 804.0-804.6 (1979); A. 14-15. The school committee of the city, town, or school district which assigns a special needs child to a private school is required to bear the expenses associated with that placement. Mass. Gen. Laws Ann. ch. 71B, § 5 (West Supp. 1981); A. 10. In no event may a parent or guardian be charged for the educational component of a special education program. Mass. Gen. Laws Ann. ch. 71B, § 10 (West Supp. 1981); A. 12. If a parent objects to a special education program selected for his or her child, the parent

may appeal the placement, first administratively and then judicially. Mass. Gen. Laws Ann. ch. 71B, § 3; A. 7-8. Neither the statute nor the regulations promulgated thereunder indicate whether a placement appeal can be based solely on possible restraints on the free speech of teachers instructing children in a private placement.

Against this background the petitioners herein assert that the School acted under color of state law when it dismissed them from their positions as teachers and counselors for supporting student rights and criticizing school policies and administration. The School is a small non-profit institution which provides a high school program to approximately 50 students who are unable to function in a normal high school setting. J.A. 75; R.R. 39. *See also* 641 F.2d at 16-17; P.A. 3. It is located on privately-owned land in the Town of Brookline, Massachusetts, 641 F.2d at 16; P.A. 3, and is organized under the laws of the Commonwealth of Massachusetts. J.A. 73; R.R. 38 Operation of the School is under the control of a Board of Directors, no member of which is a government official or is appointed by a governmental body. 641 F.2d at 16-17; P.A. 3.

As of 1978, all 50 students enrolled at the School had alcohol, drug, or behavioral problems or other special needs, 641 F.2d at 17; P.A. 3, and had been placed in the School pursuant to Chapter 766 by the Town of Brookline, the City of Boston, or the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. J.A. 90. *See also* 641 F.2d at 17; P.A. 4. All were attending on a tuition-free basis. 641 F.2d at 17; P.A. 3. The students received a diploma certified by the Town of Brookline School Committee upon graduation. J.A. 23. The Town of Brookline maintained no suitable facilities for educating these students within its traditional public schools.[13]

[13] Although the court of appeals found no support in the record for this assertion, 641 F.2d at 17 n.2; P.A. 3-4 n.2, the affidavit of Wayne Klug, which was a part of the record below, stated, at paragraph 3: "The Town of Brookline, from which a large number of the School's students come, has no educational programs which can meet the special needs of the students which it refers to the School, within its public school system." J.A. 83.

In fiscal year 1975-76, 91% of the School's funding came from public sources. In fiscal year 1976-77, public sources accounted for 99% of the School's funds. J.A. 86. *See also* 641 F.2d at 17 n.5; P.A. 4-5 n.5. A portion of these funds was provided by the LEAA under a grant which was channeled to the School through the MCCJ. J.A. 92-104. *See also* 641 F.2d at 18-19; P.A. 7-8. The grant was to fund a vocational counseling and placement program at the School during the years 1976 and 1977. *Id.* Ms. Rendell-Baker's position was funded by this grant. J.A. 75; R.R. 39. *See also* 641 F.2d at 19; P.A. 8.

On December 2, 1976, according to the complaint in *Rendell-Baker*, students at the School petitioned its Board of Directors seeking reinstitution of the limited role played by the Student-Staff Council in personnel decisions at the School. J.A. 76. Ms. Rendell-Baker spoke in favor of the student petition, which was opposed by the School's Director, Sandra Kohn. *Id.* On January 3, 1977, according to the complaint, Ms. Kohn fired Ms. Rendell-Baker for expressing an opinion contrary to her own. *Id.* Before notifying Ms. Rendell-Baker that she was to be discharged, Ms. Kohn advised the MCCJ of her intentions. R.R. 63, 98. After the dismissal, the MCCJ advised the School that it would not approve the hiring of a replacement for Ms. Rendell-Baker until the School provided a satisfactory explanation to the MCCJ for the dismissal. R.R. 104. The School provided an explanation and, by letter to the School dated March 29, 1977, the MCCJ indicated its satisfaction with that explanation. R.R. 115. Ms. Rendell-Baker filed suit on July 28, 1977.

The dismissals in the *Klug* case occurred on June 16, 1978, shortly after petitioners had complained privately to the School's Board of Directors and publicly in a letter to the *Brookline Chronicle* about the failure of the School to provide a proper educational environment, the attempted denial of student free speech rights, and other aspects of the School and

its administration. *E.g.*, J.A. 23-27, 30-31, 59-62. Thus the criticism which led to the dismissals in the *Klug* case, like that in the *Rendell-Baker* case, related directly to the performance by the School of its duties as a provider of educational services under Chapter 766.

As noted, the Court of Appeals for the First Circuit held that the School did not act under color of state law in discharging the petitioners. Accordingly, it affirmed summary judgment in favor of defendants in *Rendell-Baker* and reversed the order denying defendants' motion to dismiss in *Klug*.

Summary of Argument

Petitioners allege that they were terminated for expressing opinions concerning matters affecting the education of their students. They would be entitled to the protection of the Fourteenth Amendment if the relationship between the School and the state were such that their dismissal may fairly be attributed to the state. The School's dismissal of petitioners may fairly be attributed to the state under two theories.

A. The state delegated to the School its statutory obligation to provide suitable public education to students placed at the School. The provision of such education is a governmental function for three reasons. First, it has been held that, for purposes of equal protection analysis, public education is a governmental function, not merely a function affected with a public interest, because it "fulfills a most fundamental obligation of government to its constituency." *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979). For this same reason, public education should be classified as a governmental function for purposes of state action analysis. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978), are not to the contrary since the Court recognized that functions such as public education might be considered sovereign functions for state action purposes without meeting

the *Jackson* test. 436 U.S. at 163-64. Second, when the state requires its political subdivisions to provide a service to a particular class of citizens, at public expense, those citizens reasonably expect that the service will be provided in accordance with constitutional standards, whether or not the state was the exclusive provider of that service in the past. The state's provision of that service pursuant to statute thus becomes a legislatively-declared sovereign function. Finally, the provision of public education in Massachusetts, including publicly-funded special education, has traditionally been a function exclusively reserved to the state. Therefore, it is a sovereign function under *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978) and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). In discharging the obligation of the state and its political subdivisions to provide suitable public education to students with special learning needs, the School was thus performing a delegated sovereign function. Therefore, in accordance with prior cases, the School was an instrumentality of the state such that its actions may be attributed to the state.

B. Because the Court has long recognized the impossibility of defining precise boundaries to the scope of the Fourteenth Amendment, it has often attempted to suggest guidelines to assist lower courts in determining where those boundaries might lie in a particular case. The guidelines often do not provide assistance, however, because they tend to focus exclusively on the indicia of state action and not on the underlying constitutional interests often competing for recognition and protection in a particular case. Where, as here, there are present such traditional indicia of state action as interdependence between the state and the private actor, the delegation by the state to the private actor of a traditional governmental function like public education, virtually complete state funding and substantial state regulation of the private actor, and total dependence of the private actor on the state as a source of business, it is necessary and proper to balance the competing

constitutional interests to determine which should prevail.

In this case, the School's privacy and associational interests are clearly subordinate to petitioners' free speech interests. Petitioners are responsible for instilling their students, through the courses they teach and the examples they set, with the values and attitudes necessary for the maintenance of a healthy democracy. They are also an indispensible source of information to parents and a vital link in the chain of communication between the classroom and the community at large. They would be unable to perform any of these functions effectively if their speech were subject to absolute censorship by school administrators.

The School's assertion of countervailing privacy and associational rights, on the other hand, is exceedingly weak. The School is entirely dependent upon the state for students and almost entirely dependent upon the state for funds. In return for students and the public funds which accompany them, the School agrees to assume responsibility for providing students the suitable education which is theirs by right. As long as the School chooses to assume this responsibility for the education of the state's public school children, it cannot reasonably expect to enjoy the privacy and associational rights of ordinary private schools. Therefore, on balance, it is appropriate in this case to afford petitioners the protection of the Fourteenth Amendment.

Argument

I. Petitioners Have Stated Valid Claims for Relief If Their Dismissal May Fairly Be Attributed to the State.

Section 1 of the Fourteenth Amendment provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV, § 1. Acting pursuant to enforcement authority conferred in Section 5 of that amendment, Congress enacted 42 U.S.C. § 1983 (1976), which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress.

One of the rights secured by the Constitution and thus protected against infringement by persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State" is the right of free speech. *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939). Since petitioners maintain that they were dismissed as teachers and counselors at the School for exercising their right of free speech, their complaints state claims under 42 U.S.C. § 1983 (1976) if the action of the School in terminating their employment "may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). *See Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). For reasons set forth herein, the School's actions may be attributed to the state. Therefore, petitioners' claims should not have been dismissed for lack of state action.[14]

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[14] Although *Rendell-Baker* was decided on a motion for summary judgment, while *Klug* was decided on a motion to dismiss, the First Circuit, upon invitation of appellees in *Klug*, drew upon the record of both cases in holding that state action was not present. 641 F.2d at 16; P.A. 2-3. The court also noted that the record in *Rendell-Baker* "tends, if anything, to support rather than to weaken [the] claim of state action." *Id.*

II. The Action of the School in Dismissing Petitioners May Fairly Be Attributed to the State and Is Therefore Subject to Review Under the Fourteenth Amendment.

At least since the decision in *The Civil Rights Cases*, 109 U.S. 3 (1883), the Court has recognized that "the prohibitions of the [Fourteenth] [A]mendment are against State laws and acts done under State authority." 109 U.S. at 13. While there is a considerable body of literature which argues that the language of the amendment itself does not require that the prohibited conduct take the form of state action, as distinguished from state inaction,[15] there does appear to be a consensus that the "state action" requirement, in whatever its proper form, reflects this nation's abiding commitment to a wide variety of privacy interests, including the right of free association, the right to own and enjoy the exclusive use of private property, and even the "right to be let alone." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *See also Roe* v. *Wade*, 410 U.S. 113, 153 (1973) (Court suggests right of privacy "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action"), and the articles cited in note 15, *supra*.

The question of whether sufficient state action was present in a particular case to invoke the protection of the Fourteenth Amendment has arisen frequently. The Court has employed a wide variety of analytical approaches to find the requisite state action in an equally wide variety of contexts.[16] Conversely,

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[15] *See, e.g.*, Glennon and Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup. Ct. Rev. 221; Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. Cal. L. Rev. 208 (1957); Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69 (1967); Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962).

[16] *E.g.*, *Nixon* v. *Condon*, 286 U.S. 73, 88-89 (1932) (exclusion of black voters fom Democratic party by party executive committee held to be state action, on the ground that the committee, for constitutional purposes, was an

claims of state action have also been rejected in various cases.[17] However, despite the wide variety of contexts in which the Court has addressed the state action issue, no prior case has involved a confluence of as many individual elements weighing in favor of state action as the case now under consideration. Those elements include the following:

1. The state, through its political subdivisions, is obligated by statute to provide suitable public education to all children, including those who have special education needs.

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agent of the state); *Marsh* v. *Alabama*, 326 U.S. 501 (1946) [hereinafter, *"Marsh"*] (enforcement of state trespass law against distributors of religious literature on the streets of a company town held to be state action, because the owners, in maintaining the town, were performing a public function); *Shelly* v. *Kraemer*, 334 U.S. 1 (1948) (state's enforcement of private agreement prohibiting transfer of property to racial minorities held to be state action, where the "full coercive power" of the state's common law was invoked to prevent a willing seller from selling to a willing buyer); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) [hereinafter, *"Burton"*] (racially discriminatory policies of private restaurant which leased space in publicly-owned parking facility held to be state action, where the state had "insinuated itself into a position of interdependence" with private restaurant); *Evans* v. *Newton*, 382 U.S. 296 (1966) (state action found where state court accepted resignation of municipal trustees of racially segregated park and appointed private trustees, on the ground that the city appeared to remain interested in the maintenance of the park and the maintenance of a park was a public function); *Reitman* v. *Mulkey*, 387 U.S. 369 (1967) (enactment of amendment to state constitution guaranteeing private individuals the right to discriminate in the sale or lease of real property violated the Fourteenth Amendment, since it authorized discrimination).

[17] *E.g.*, *Evans* v. *Abney*, 396 U.S. 435 (1970) (no state action where state court terminates trust and enforces reverter provision in will, rather than applying *cy pres* doctrine to require trustees to admit blacks to municipal park); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) (no state action where private club which held state liquor license practiced racial discrimination); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) [hereinafter, *"Jackson"*] (no state action where heavily regulated private utility which arguably enjoys state-conferred monopoly terminates customer's service for nonpayment, without prior hearing); *Hudgens* v. *NLRB*, 424 U.S. 507 (1976) (no state action where owner of shopping plaza threatens to invoke state trespass law to evict labor pickets); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978) [hereinafter, *"Flagg"*] (no state action where warehouseman, acting pursuant to state statute, satisfies lien for storage charges through sale of stored property).

2. By law, the state must provide special education in a public school, unless suitable education is unavailable there.[18]

3. When suitable education is unavailable in a public school, the state may discharge its statutory obligation by paying an ostensibly private institution like the School to provide it, in accordance with detailed regulations prescribed by the state, and subject to periodic reevaluation by the School and public authorities to determine if the student can be returned to a traditional public school.

4. Although students and parents participate in the placement decision, the law confers upon state authorities, not the student or his parents, the ultimate right to select the school which the student must attend to receive his publicly-financed special education.[19]

5. All the students enrolled at the particular school involved in this case had been placed there by public authorities.

6. Virtually all the operating funds of the school involved in this case had been supplied by the state.

7. The school involved in this case was authorized to issue high school diplomas certified by the local school committee.

8. The challenged activity of the school, *i.e.*, the firing of teachers and counselors for expressing opinions on matters affecting students' education, was intimately related to the governmental function which the state had delegated to the school.

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[18] "The statute impliedly requires, and the regulations explicitly mandate, public school education to the maximum extent possible; private school placements are permitted only as a necessary alternative." *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 505-06, 417 N.E.2d 408, 410.

[19] The regulations promulgated pursuant to the statute require the Administrator of Special Education to select the prototype and specific program for the child. 603 Code Mass. Regs. § 28, par. 322.2 (1979); A. 13. Of course, parents and the child participate in the evaluation which leads to the placement and may appeal the placement proposed. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981); A. 4-9.

Taking into account the above policies underlying the state action requirement, prior state action decisions of the Court, and the specific indicia of state action present in this case, there are at least two theories under which the School's attempt to suppress petitioners' speech was actionable under the Fourteenth Amendment.

A. *The School Was Performing the Sovereign Function of Providing Public Education.*[20]

1. *When the State Delegates a Sovereign Function to an Ostensibly Private Actor, That Actor Becomes Subject to the Fourteenth Amendment.*

One test of state action is whether the power being exercised or the service being provided by an ostensibly private actor is a sovereign function. *See Jackson*, 419 U.S. at 352-53. Motive for the delegation is not determinative. *E.g.*, *compare Smith* v. *Allwright*, 321 U.S. 649 (1944) (delegation to private actor following holding that action directly by state was impermissible), *and Nixon* v. *Condon*, 286 U.S. 73 (1932) (same), *with Marsh* (no intimation that state allowed company to act as town government for the purpose of restricting free speech rights in the town). Rather, the guiding principle in these sovereign function cases is that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966).

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[20] Since the Court appears to use the terms public function, sovereign function, and governmental function interchangeably, *see, e.g.*, *Flagg*, 436 U.S. at 158, 161, 163; *Evans* v. *Newton*, 382 U.S. 296, 299 (1966), petitioners shall also do so.

At the outset, it is helpful to note that the issue of whether the state delegated the performance of a public function to the School consists of two separate questions. The first, quite simply, is whether the state delegated some function. The second is whether the function delegated, if any, is a public function. In response to the first question, it is clear that the state and its political subdivisions did delegate to the School their statutory obligation to provide suitable public education to students with special learning needs.[21] Since this fact cannot seriously be disputed, petitioners proceed immediately to the question of whether the provision of such education is a public function.

In *Jackson*, the Court made two important observations concerning the determination of whether a particular function is a public function. First, it observed that, in prior cases where a function had been classified as a public function, the function was one which had been "traditionally exclusively reserved to the State." *Jackson*, 419 U.S. at 352. The second observation was that a function did not become a public function simply because it was "affected with a public interest." *Id.* at 353-54.

[21] The state's delegation to an ostensibly private school of its statutory obligation to provide publicly-funded special education must not be confused with the routine sharing of the state's educational duties with ordinary private schools. In the former case, the school is providing public education, because students are assigned there by the state to receive the special education which is theirs by right, and that education is paid for with tax dollars provided by the state. In the latter case, the school is providing private education, because students and their parents select the private school themselves, and they either pay the tuition themselves or receive discretionary assistance from other private sources. Thus, in the latter case, although the state and the private school are performing parallel functions, the state has not delegated to the school its function of providing public education. For this reason, it would not follow from the conclusion that the School in this case is subject to the Fourteenth Amendment that all private schools are. *Cf. Evans* v. *Newton*, 382 U.S. 296, 321-22 (1966) (Harlan, J., dissenting).

In *Flagg*, 436 U.S. at 159, the Court again observed that prior public function cases had in common "the feature of exclusivity." Significantly, however, in neither *Jackson* nor *Flagg* did the Court hold that the "tradition and exclusivity" route was the only one a court could take to find that a certain function was a public function. To the contrary, in *Flagg*, the Court reserved decision on whether "such functions as education," which are "not covered by our election cases or governed by the reasoning of *Marsh*," may be delegated by the state free of the "strictures of the Fourteenth Amendment." *Id.* at 163-64. This case presents that unanswered question.

There is ample support in reason and authority for the conclusion that, regardless of whether public education is a function "traditionally exclusively reserved to the State," it is a sovereign function such that the state may not delegate it free of the strictures of the Fourteenth Amendment. Moreover, even if the public function doctrine is limited to functions traditionally exclusively reserved to the state, the function of providing ordinary or special public education surely qualifies.

2. *The Provision of Public Education May Be Characterized as a Public Function Without Regard to Tradition or Exclusivity.*

Although the Court has not previously addressed the question whether public education is a sovereign function for state action purposes, it has addressed the closely analogous question of whether it is a governmental function "for purposes of equal protection analysis." *Ambach* v. *Norwick*, 441 U.S. 68, 75 (1979) [hereinafter, *"Ambach"*]. In *Ambach*, the issue was whether a state could, as a condition of issuing certification to a public school teacher, require the applicant either to be a citizen or to manifest an intention to apply for citizenship. If public education were merely "affected with a 'public interest,' " *id.* at 73, the law conditioning certification on citizenship would violate the equal protection clause. If,

however, public education were a "governmental function," *id.* at 75, it would not. The Court upheld the constitutionality of the statute, on the ground that public education is a governmental function and not merely a function affected with a public interest.

In reaching its conclusion that public education is a governmental function, the Court did not look to tradition or exclusivity, but rather "to the role of public education," *id.*, for the purpose of determining whether it " 'fulfill[ed] a most fundamental obligation of government to its constituency.' " *Id.* at 76, *quoting Foley* v. *Connelie*, 435 U.S. 291, 297 (1978). The Court not only decided that public education fulfilled such a fundamental obligation, but it reaffirmed that "education is perhaps the most important function of state and local governments." *Id.* at 76-77, *quoting Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). The Court also cited *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972), where the Court had noted that "[p]roviding public schools ranks at the very apex of the function of a State." *Ambach*, 441 U.S. at 77.

For the same reason that public education is classified as a governmental function for equal protection purposes, it should surely be classified as a governmental function for state action purposes. That reason, in short, is that "the continued good health of [our] democracy" is vitally dependent upon the way in which public education fulfills its critical mission of influencing students' attitudes toward "government, the political process, and a citizen's social responsibilities." *Id.* at 79. The same is true whether students receive their public education in a publicly-owned building, where teachers are paid directly by the state, or in a privately-owned building, where teachers are paid with funds provided by the state. In either case, public education's critical mission would be seriously jeopardized if the Fourteenth Amendment were not available to protect the providers of that education. Thus, it is unnecessary for the Court to examine tradition or exclusivity to hold that the pro-

vision of public education is a governmental function such that an ostensibly private school to which the state delegates that function becomes subject to the same constitutional obligations as the state itself, in connection with the performance of that function.[22]

There is, moreover, a second reason why it may be determined, without regard to tradition or exclusivity, that the provision of public education is a sovereign function. Chapter 766 places the responsibility for the provision of suitable public education for children with special learning needs on the state and its subdivisions. In this respect, the Commonwealth's approach to the provision of special education differs fundamentally from Pennsylvania's approach to the provision of electrical power. As the Court noted in *Jackson:*

> [W]hile the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty.

419 U.S. at 353.

The tradition and exclusivity branch of the public function test, as articulated in *Jackson* and applied in *Flagg*, was thus born of the necessity to identify public functions for state action purposes when the state itself either had denied that the

[22] The state respondents concede that "the School performes [*sic*] a public function," Brief of Respondents Bellotti and Highgas in Opposition to the Petition for the Writ of Certiorari at 10, but they appear to argue that the public function of providing special education does not encompass the firing of teachers and counselors for expressing opinions on matters affecting that education. In light of the many cases which emphasize the close relationship between teacher free speech and the educational process, *see, e.g., Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960), and in the light of the decision in *Marsh*, where the community's right to receive information was instrumental to the decision to protect plaintiff's right to distribute literature, they are surely mistaken. See also pp. 36-39, *infra*.

service was a sovereign function or had failed to obligate itself to perform it. In such cases, tradition and exclusivity are significant because they give rise to a reasonable expectation that the service will be provided in accordance with constitutional requirements, regardless of the state's efforts to disclaim responsibility. However, where the state itself assumes a legal obligation to provide a particular service, it should not be necessary to examine tradition and exclusivity to conclude that all citizens reasonably expect and have a right to demand that the service will be provided in accordance with constitutional requirements, whether the state performs the service itself or pays someone else to do so.[23] Therefore, it should not be necessary to find that the function of providing publicly-funded special education was traditionally exclusively reserved to the state in order to hold that the provision of such education is today a legislatively-declared sovereign function in Massachusetts.[24] *See Perez* v. *Sugarman*, 499 F.2d 761, 765 (2d Cir. 1974) (public function test met where state statute provides that government is ultimately responsible for the provision of the service); *cf. Gilmore* v. *City of Montgomery*, 417 U.S. 556, 561-62 (1974);[25] *Terry* v. *Adams*, 345 U.S. 461, 468

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[23] *Cf. Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 519-20, 417 N.E.2d 408, 418, where the Massachusetts Supreme Judicial Court, in holding that the payment of public funds to ostensibly private schools under Chapter 766 did not violate a prohibition in the Constitution of Massachusetts against the expenditure of public money for the aid of any private school, quoted with approval *Hager* v. *Kentucky Children's Home Soc'y*, 119 Ky. 235, 246 (1904), as follows: "That the state chooses a private institution as its instrumentality does not despoil the public nature of the appropriation, for it has been said 'that the vital point in all such appropriations is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or is not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means.' "

[24] The Massachusetts Constitution recognizes the right of the people "to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it." Massachusetts Constitution, Declaration of Rights, Art. VII; A.1.

[25] In *Gilmore*, the issue was whether the use of municipal parks and recreational facilities by private segregated school groups and nonschool

(1953) (Opinion of Black, J.) (reliance in part on a federal statute regarding state and local elections to define the type of elections which were a public function reached by the Fifteenth Amendment).

3. *The Function of Providing Public Education, Including Special Education for the Educationally Handicapped, Has Traditionally Been Exclusively Reserved to the State.*

As previously noted, the Court in *Jackson* observed that prior public function cases involved functions that had been "traditionally exclusively reserved to the State." Focusing on the first element, it has been stated too often for there to be any lingering doubt that the provision of public education is a traditional function of state and local governments. *See Ambach*, 441 U.S. at 76-78 (and cases cited therein); *National League of Cities* v. *Usery*, 426 U.S. 833, 855 (1976); *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972); *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). Moreover, although not noted by the court below, Massachusetts has a long tradition of providing suitable publicly-funded education to children who are now recognized as having special education needs. Thus, as early as 1848, in a report to the state legislature, Samuel Gridley Howe wrote:

> Massachusetts admits the right of all her citizens to a share in the blessings of education; she provides it liberally for all her more favored children; *if some be blind or deaf, she still continues to furnish them with special instruction at great cost;* and will she longer neglect the poor idiot,—the most wretched of all who are born to her,—those who are usually abandoned by their fellows,

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groups that discriminated on the basis of race involved state action. In an earlier decision in the same case, noted in the Court's opinion, the lower court had concluded that, under an Alabama statute, joint provision of recreation facilities by the YMCA and the city was a statutorily-declared public function for state action purposes. 417 U.S. at 561-62, *quoting Smith* v. *Young Men's Christian Association*, 462 F.2d 634, 641-42 (5th Cir. 1972), *aff'g as modified, id.*, 316 F. Supp. 899 (M.D. Ala. 1970).

> —who can never, of themselves, step up upon the platform of humanity,—will she leave them to their dreadful fate, to a life of brutishness, without an effort in their behalf?

Harbor Schools, Inc. v. *Board of Appeals*, 5 Mass. App. Ct. 600, 606 n.7 (1977), *quoting* 1848 Sen. Doc. No. 51, at 52 (emphasis added).[26] The Legislature responded to Howe's plea for the extension of special education to include "idiots" and appropriated money that year for that purpose. Res. 1848, c. 65.

In its earliest form, Chapter 766 dates back to 1919, when the Legislature passed "An Act To Determine The Number Of Children Retarded In Mental Development And To Provide For Their Instruction." St. 1919, c. 277. This statute required the school committee of every town to ascertain annually, under regulations prescribed by the board of education and the director of the commission on mental diseases, the number of children in its public schools who were three or more years retarded in mental development. In towns where there were ten or more such children, "special classes" for their instruction "adapted to their mental attainments, under regulations prescribed by the board" were required. In 1954, the statute was amended to require special classes in towns where there were five or more mentally retarded children and to provide for the discretionary establishment of special classes in towns where there were less than five such children. St. 1954, c. 514, § 5.

Since 1930, Massachusetts towns have been required to provide for the special education of physically handicapped children by "employ[ing] a teacher or teachers, on full or part

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[26] In that case, the court held that a private, nonprofit school which is qualified to accept Chapter 766 placements is serving an " 'educational purpose which is. . . public,' " thereby exempting the school from local zoning laws. *Id.* at 607, *quoting* Mass. Gen. Laws ch. 40A, § 2, as amended by St. 1959, ch. 607, § 1.

time, who shall, with the approval in each case of the department [of education] and the...commissioner of public welfare, offer instruction to said children in their homes or at such places and under such conditions as the [school] committee may arrange." St. 1930, c. 368. Since 1960, Massachusetts has required the same special education for any child "so emotionally disturbed as to make attendance at a public school not feasible." St. 1960, c. 750, § 1. Thus, special as well as ordinary public education has had a long tradition in Massachusetts.

The second element of the *Jackson* test is exclusivity. As used in *Jackson*, the term seemed to refer to the extent to which the state, in the past, had reserved to itself the performance of a particular function. As used in *Flagg*, however, the term exclusivity may refer to the extent to which the private entity is the only one presently performing that function. In whichever sense the term is used, however, the exclusivity requirement is also satisfied in this case.

Thus, considering the first possible meaning of the term exclusivity, it does not appear that there was ever a time when individuals in need of, but unable or unwilling to pay for, special education in Massachusetts had a right to look to any institution other than the state for such education. In this sense, the power and the duty to spend public funds to provide suitable education to every child in the Commonwealth has always exclusively resided in and been an exclusive obligation of the state.

On the other hand, if exclusivity refers to the extent to which an ostensibly private entity has become the exclusive provider of a particular service traditionally provided by the state, the exclusivity requirement is still satisfied. The School is the only institution to which its students can go to receive suitable public education.[27] Of course, students assigned to the School may

[27] As noted, however, parents do have the right to appeal if they are dissatisfied with a proposed placement. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981); A. 7–8.

choose to return to their local public school or to enroll in a traditional private school. However, since they could not have been removed from the public school system in the first place if the system had been capable of meeting their educational needs, *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 514, 417 N.E.2d 408, 415, and since "the statute does not permit the reimbursement of money which is spent for a child who unilaterally enrolls in private school," *id.*, the exercise of either option would require the student to choose between a suitable education and a public education, notwithstanding that the statute guarantees him both. Thus, just as persons who wished to distribute literature in Chickasaw, Alabama, could do so only on streets owned by the Gulf Shipbuilding Corp., *see Marsh*, and just as voters who wished to participate meaningfully in the election of county officials in Fort Bend County, Texas, could do so only by voting in the Jaybird Democrat elections, *see Terry* v. *Adams*, 345 U.S. 461 (1953), students assigned to the School who wish to receive the suitable public education which is theirs by right can receive it only at the School and nowhere else.

In short, whether the exclusivity requirement refers to the historical role of the state in performing a particular function to the exclusion of everone else, or to the extent to which a private actor has obtained a monopoly over the performance of that function today, the exclusivity element of the *Jackson* test, as well as the tradition element, is satisfied. Therefore, the provision of publicly-funded special education is a sovereign function such that the state may not delegate the performance of that function to an ostensibly private school free of the strictures of the Fourteenth Amendment.

B. *Under an Appropriate Balancing of Interests, Petitioners' Free Speech Rights Warranted Greater Protection Than the School's Privacy Rights.*

1. *In Determining the Presence of State Action in a Particular Case, the Court Should Look Not Just to Traditional Indicia of State Action But to the Specific Interests Competing for Consideration in the Context of the Particular Case.*

In one sense, the history of the state action requirement has been a history of the Court's attempt to define appropriate limits to the scope of the Fourteenth Amendment. This search for limits surely does not reflect the Court's philosophical objection to the amendment's primary purpose of protecting vital interests such as equal protection, free speech, and due process, but rather a well-founded concern for the protection and preservation of the often conflicting fundamantal rights of free association, privacy, and the right to own and enjoy the exclusive use of private property.

Although the Court has long recognized the impossibility of ever defining precise limits to the scope of the Fourteenth Amendment, *e.g.*, *Burton*, 365 U.S. at 722; *Reitman* v. *Mulkey*, 387 U.S. 369, 378 (1967), it has often attempted to suggest guidelines to help lower courts and interested individuals determine whether those limits have been reached or exceeded in any particular case. Experience has shown, however, that the guidelines will not always suggest the proper, or even consistent, results in all cases. For example, on various occasions, the Court has suggested that the following factors are to be taken into account in determining state responsibility for ostensibly private conduct:

1. *Whether the state's involvement was "significant."* *Burton*, 365 U.S. at 722. The distinction between significant and insignificant state involvement has not always been followed, however. For example, in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), the Court, in *dictum*, stated that the furnish-

ing of essential services such as electricity, water, and police and fire protection to segregated private schools would not violate the Fourteenth Amendment because, *inter alia*, such services were "necessities of life," not readily available from other sources. *Id.* at 465, *quoting Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972). However, for that very reason, the state's provision of such services to private segregated schools would appear to be extremely significant in promoting and perpetuating a dual school system. *See* note 32, *infra*.

2. *Whether the state had compelled, rather than merely permitted, the challenged activity. Flagg*, 436 U.S. at 164-65. However, the Court itself has apparently not always found it possible to adhere to the distinction between permission and compulsion. *See, e.g., Reitman* v. *Mulkey*, 387 U.S. 369, 381 (1967) ("Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market"); *Burton*, 365 U.S. at 725 ("By its inaction, the Authority . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination"). Moreover, it is not difficult to hypothesize other cases which would place enormous strain on the proposed dichotomy between permission and compulsion. For example, one would hope that state inaction, *simpliciter*, would not insulate the private utility in *Jackson* from liability if it terminated service to minorities or to opponents of a proposed rate increase. *See Jackson*, 419 U.S. at 374 (Marshall, J., dissenting).

3. *Whether there was a nexus between the state's involvement and the challenged activity. Jackson*, 419 U.S. at 351. However, the absence of a nexus between the state and the exclusion of black people from the Democratic party was

not dispositive in *Smith* v. *Allwright*, 321 U.S. 649 (1944), where the state seemed to be involved in virtually all aspects of primary elections, except the establishment by the Democratic party of membership requirements.[28]

4. *Whether, in public function cases such as* Smith v. Allwright, id., *the function under consideration had been "traditionally exclusively reserved to the State." Jackson*, 419 U.S. at 352. However, whether a function is deemed to be traditionally exclusively reserved to the state may often depend upon how broadly or narrowly one chooses to define the function. For example, the "conduct of...elections themselves," *Flagg*, 436 U.S. at 158, may fit the definition of a public function, but prescribing the membership rules for a political club or party probably would not meet the *Jackson* test.

5. *Whether the challenged conduct had received regulatory approval after a hearing, as distinguished from regulatory approval without a hearing. Compare Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 462 (1952) *with Jackson*, 419 U.S. at 355-56. However, that distinction was not dispositive of the state action issue in *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 119-20 (1973).

6. *Whether the private entity involved had taken on all the attributes of the state, or only some of those attributes. Compare Marsh with Hudgens* v. *NLRB*, 424 U.S. 507 (1976). However, the result in *Marsh* would surely have been the same even if the owner of Chickasaw, Alabama, had not supplied Chickasaw residents with, for example, sewage treatment services. Conversely, if the owner of a shopping plaza which admittedly had not taken on all the attributes of a town sought enforcement of covenants inserted by him in all retail store leases prohibiting plaza merchants from hiring or selling to

[28] While *Smith* v. *Allwright* was decided under the Fifteenth Amendment, rather than the Fourteenth, the state action issue was the same.

minorities, one would hope the case would not be summarily dismissed on the authority of *Hudgens*.

As the foregoing examples illustrate, it is almost as difficult to formulate useful guidelines in the state action area as it is to define precise boundaries. This should not be at all surprising, however, since rights such as equal protection, free speech, and due process, on the one hand, and free association, privacy, and private property, on the other, all occupy lofty positions in our hierarchy of values. When they clash, as they inevitably will, it would be remarkable indeed if, in each case, the interest to which a reasoned judgment would assign greater weight invariably coincided with the presence or absence of any one or more traditional indicia of state action. For example, if the private utility in *Jackson* refused to extend service to opponents of a proposed rate increase, all the indicia of state action (including the absence of a nexus between the state and the decision to terminate service) would be identical to those in the actual case. Nevertheless, a reasoned analysis would suggest that the free speech rights of the terminated customers in the hypothetical case would be entitled to more consideration than the due process rights of the terminated customers in the actual case. This is not to say that the customers in the hypothetical case would necessarily prevail or that, on some abstract scale, free speech is more important than due process. It is only to suggest that the weight any particular interest should be given, relative to any countervailing interest, will depend upon the totality of the circumstances in which that right is asserted. Therefore, guidelines which focus only on the indicia of state action, to the exclusion of the underlying interests competing for recognition and protection in a particular case, are likely to be inadequate.

Perhaps in recognition of the fact that the context in which a right is asserted may sometimes affect the weight it should be given, the Court, on occasion, has frankly spoken in terms of balancing competing interests. For example, in *Marsh*, 326 U.S. at 509, Justice Black, speaking for the Court, stated:

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.... In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of state statute. (Footnote omitted.)[20]

Some lower courts are also coming to the realization that "[s]imply totting up the number of state contacts is no longer a proper way of resolving close state action questions." *Edwards* v. *Maryland State Fair and Agricultural Society*, 476 F. Supp. 153, 156 n.4 (D. Md. 1979), *modified on other grounds but affirmed as to state action determination*, 628 F.2d 282 (4th Cir. 1980). In *Edwards*, the issue was whether a private, nonprofit, tax-exempt corporation which was designated by the state to operate a state fair and whose operations were state-subsidized was a state actor, for purposes of restricting the distribution of religious literature at the fair to booths. In holding it was, the court stated:

> Having reviewed these more recent approaches to state action analysis, the Court must now apply a balancing analysis which evaluates not only the overall relationship between the state and private entities (regardless of whether it is termed a "symbiosis" or a "nexus") but also the relationships between competing liberty interest and constitutional values. Utilizing this analysis, the Court finds that the relationship between the State of Maryland

[20] *See also Burton*, 365 U.S. at 722, where the Court stated: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

and the Agricultural Society is sufficient to find that the enforcement of the booth rule constitutes state action. 476 F. Supp. at 158.

Petitioners submit that, at least on those occasions where, as here, there are present such traditional indicia of state action as interdependence between the state and the private entity, substantial state funding and regulation, the delegation by the state of a traditional governmental function like education, and the virtually complete dependence of the private entity on the state for all its business (and hence its existence),[30] it is necessary and proper for the Court, in determining the applicability of the Fourteenth Amendment to particular conduct, to look beyond such indicia to the interests competing for protection, whether or not any specific, previously established guideline for determining state action is satisfied.[31] Those in-

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[30] Also, in the *Rendell-Baker* case, the state, through an MCCJ official, had evidenced its belief that it had some responsibility for the hiring and firing of employees whose positions were funded by LEAA grants. R.R. 104; 641 F.2d at 27-28; P.A. 25.

[31] Several commenators have argued that the Court should abandon entirely its search for indicia of state action, because state action is present whenever the state, in performing its primary function of defining right-duty relationships, favors one interest over another. Thus, they argue that the proper inquiry is not whether state action is present, but whether unconstitutional state action is present. They further argue that the question can be answered only by a balancing of the interests at stake. *See, e.g.*, Glennon and Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup. Ct. Rev. 221; Horowitz, *The Misleading Search for "State Action" under the Fourteenth Amendment*, 30 S. Cal. L. Rev. 208 (1957); Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69 (1967); Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962); Note, *State Action and the Burger Court*, 60 Va. L. Rev. 840 (1974). Whatever the merits of such arguments, a balancing approach can be employed in the present case and others like it, where substantial indicia of state action *are* present, without abandoning, or even compromising, the notion that the state must have some significant, affirmative involvement before the safeguards of the Fourteenth Amendment come into play.

terests must then be balanced to determine which should prevail. If in a particular case the Court determines that the plaintiff's interest in a fundamental right such as equality can be protected with minimal interference with the defendant's interest in privacy or free association, as was the case in *Burton*, the Court should hold, as a matter of law, that the defendant's conduct is subject to scrutiny under the Fourteenth Amendment. Conversely, if the Court determines that a substantial invasion of one person's privacy rights would be required to protect another person from a *de minimis* impairment of a fundamental right, the Court should hold, as a matter of law, that the Fourteenth Amendment is not applicable.[32]

The proposed analysis offers two principal benefits:

1. It acknowledges that the true significance of any particular indicia of state action cannot be determined in a vacuum, but only with reference to the interests competing for recognition and protection in a particular case. For this reason, identical indicia of state action may warrant a determination of state responsibility under some circumstances but not others. For example, in *Jackson*, the fact that the state

[32] Such might be the case, for example, if an omitted child claimed "state action" in the state court's allowance of his father's will, from which he had allegedly been excluded for marrying a woman who was not born of the same religion. *Cf. Gordon* v. *Gordon*, 332 Mass. 197, 124 N.E. 2d 228, *cert. denied*, 349 U.S. 947 (1955). The proposed analysis might also explain the statement in *Norwood* v. *Harrison*, 413 U.S. 455, 465 (1973), to the effect that a state does not violate the Constitution by providing necessities of life to a racially segregated private school. As *Norwood* itself reaffirmed, the right of parents to send their children to private school is itself a fundamental right. 413 U.S. at 461. To deprive any private school of the necessities of life would obviously constitute the most severe form of impairment of that right. Thus, under an appropriate balancing approach, essential services such as electricity, water, and police and fire protection may be provided, even though less significant forms of aid such as textbooks may not.

arguably conferred a monopoly upon a private utility and closely regulated its activites did not compel the conclusion that the utility's decision to terminate a customer's service for nonpayment was attributable to the state. Given the same combination of factors, however, it may be appropriate to hold the state responsible for the utility's hypothetical decision not to extend service to minorities or to persons who speak at a public hearing in opposition to a proposed rate increase. The reason is not that equality or free speech is more important on some abstract scale than the due process rights of delinquent customers, but because the right to receive payment for the provision of service is more fundamental to our notion of private property than the right to withhold service from a customer who is ready, willing, and able to pay. Thus, requiring a private utility to provide what in effect would be free service to nonpaying customers would be a far more substantial invasion of the utility's property rights than requiring it to provide service to minorities or opponents of a proposed rate increase.[33]

2. At present, lower courts tend to detect the presence of state action through the mechanical process of first identifying points of contact between the state and the challenged conduct and then trying to find other cases, involving similar contacts, from which they can reason by analogy. What is lacking, and what the proposed analysis will provide, is a rational framework for decision. Once the court determines that substantial indicia of state action are present, instead of trying to decide if the case is more like one case or another, it can

[33] By the same token, to the extent that society benefits from the fact that the private sector continues to bear primary responsibility for the building of power plants, there would be more disincentive to such socially desirable activity if the owners were forced to provide free power to nonpayers than if they were forced to sell power for a profit to anyone who desired to buy it.

move on to the less mechanical and more meaningful task of sorting out and weighing the competing interests at stake, to determine which is more deserving of protection upon the facts of the particular case at hand.[34] Since there are bound to be some cases where the interests will be in close balance, the decision-making process will still often be difficult. To the fullest extent possible, however, it will at least be forthright and rational.

2. *Since Substantial Indicia of State Action Are Present and Since Petitioners' Free Speech Rights Are More Deserving of Protection in This Particular Case Than the School's Privacy Rights, Petitioners Are Entitled to the Protection of the Fourteenth Amendment.*

Applying the proposed analysis to the present case, it is immediately apparent that there are substantial indicia of state involvement. In fiscal year 1975-76, 91% of the School's funding was derived from public sources. By 1976-77, this figure had risen to 99%. As of 1978, all fifty of the School's students had been placed there by the Town of Brookline, the City of Boston, or the Drug Rehabilitation Division of the

[34] Note, however, that no elaborate sorting or weighing would be required where the state, by statute, sought to compel conduct which abridged rights protected by the Fourteenth Amendment, such as by requiring black children to attend separate schools. In such a case, it is immediately apparent both that traditional indicia of state action are present, and that the statute seriously impairs not only equality rights but also the privacy and free association rights of members of all races who do not wish to remain separate. The statute would therefore clearly be unconstitutional. Note also, as this hypothetical illustrates, that cases in which the state attempts by statute to abridge the fundamental rights of any class of citizens do not differ analytically from other state action cases. They simply occupy an extreme position on the spectrum.

Massachusetts Department of Mental Health, at public expense, in fulfillment of the state's statutory obligation to provide public education to children with special learning needs. Local school committees prepared a special education plan for each child assigned to the School. The School was not only required by law to implement these individualized plans, but it was also required to comply with an extensive set of state regulations. While a child was at the School, the local school committee which had placed the child was required to monitor the child's progress and the School's compliance with that child's educational plan. Every three months, the School was required to reevaluate the situation to determine if the child could be transferred to a less restrictive environment. An annual reevaluation by state authorities was also required. In short, except for the fact that the state apparently chose not to become involved in the School's hiring and firing decisions,[35] it would be difficult to imagine a case where a state could be more intimately involved with the activities of an ostensibly private school.

Under the proposed analysis, however, it does not necessarily follow from the fact that the state has substantial involvement with the School and the education provided there that everything the School does should be attributed to the state for purposes of the Fourteenth Amendment. Before any conclusion can be reached regarding any particular activity, the competing constitutional interests at stake must be identified and weighed.

The identification of these interests in this case is not difficult. The School claims privacy and associational rights, including the right to hire and fire employees. Petitioners have a substantial professional interest in being able to express opinions on matters affecting the education of their students.

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[35] As previously noted, in *Rendell-Baker* it appeared that the state had even become involved in that function. *See* note 30, *supra*.

Their interest coincides with the interest of students, parents, and taxpayers in having the benefit of such opinions. It conflicts, however, with the School's asserted privacy and associational rights. The difficult task for the Court, in this or any other case where a choice must be made between competing constitutional interests, is determining which interests should prevail.

There are several reasons why petitioners' rights are clearly entitled to priority in this case. First, this Court has repeatedly recognized not only the vital function of public education in preparing children to participate in our democratic society, *see Ambach*, 75-78; *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954), but also the critical role of teachers in carrying out that function. Thus, in *Ambach*, 441 U.S. at 78-79, the Court stated:

> Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school .... Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy. (Footnotes omitted.)

For these reasons, the Court held that public school teachers perform a task "that go[es] to the heart of representative government." *Id.* at 75-76, *quoting Sugarman* v. *Dougall*, 413 U. S. 634, 647 (1973).

Two other related themes also emerge from the Court's decisions dealing with First Amendment rights of public

school teachers. The first such theme, building upon the role of teachers in society, emphasizes the importance of preserving First Amendment rights in the classroom. Thus, in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967), the Court stated:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, [364 U.S. 479, 487 (1960)]. The classroom is peculiarly the "marketplace of ideas."

The second related theme emphasizes the importance of preserving the constitutional rights of public school teachers to express opinions outside the classroom on matters of educational policy, especially when their opinions may serve to balance the opinions of school administrators. This theme was clearly articulated in *Pickering* v. *Board of Education*, 391 U.S. 563, 571-72 (1968) [hereinafter, *"Pickering"*], where the Court stated:

> More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should

> be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

It is against this background that petitioners assert their rights to express their professional opinions, in private and in public, concerning the educational process and how it might be improved.

Relative to students, parents, and the community, petitioners occupy the same positions as any other public school teachers or counselors. Students who attend the School were assigned there by state authorities to receive, at public expense, the public education which the law guarantees to them. They did not choose to attend the School in the same sense that private school students choose the school they attend.[36] Nor did their parents choose to send them to an institution where their teachers would not be free to comment upon the educational process in general or their children's progress and needs in particular.[37] Finally, taxpayers are as legitimately concerned about the use of their tax dollars to support the School's operations as about the use of their tax dollars to support traditional public schools. If petitioners were not free to comment upon educational matters concerning the School, taxpayers would be deprived of the voices of the only educators in day-to-day contact with a sizable class of beneficiaries of their tax dollars. Their sole source of information from within the School would then be School administrators, who have a vested interest in maintaining the *status quo*. *See Pickering*, 391 U.S. at 571-72.

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[36] "Those children placed in private schools under c. 766 are placed not by choice but by necessity." *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 516, 417 N.E.2d 408, 416.

[37] As previously noted, however, parents do have certain appeal rights if they are dissatisfied with a particular placement. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981).

Thus, petitioners serve not only as role models for students and as liaisons between students, parents and administrators, but also as a critical link in the chain of communication between the classroom and the community.

Petitioners are, of course, uniquely qualified to perform all these functions, by virtue of their training, their experience, their proximity to their students, and their familiarity with student needs. Moreover, they properly feel a professional and civic obligation to speak out, both because they serve as role models for their students in the teaching of social responsibility, *see Ambach*, 441 U.S. at 79, and because they have a professional interest in improving the quality of education. Also, since local school committees may not place students in private facilities unless suitable education is unavailable in local public schools, it may be inferred that petitioners would have, at best, limited opportunities to teach students with the type of learning impairments found at the School in a traditional public school setting.[38] The question thus presented is whether, under these circumstances, the privacy interests of the School are sufficiently compelling to permit it to silence petitioners and thereby sever this vital link in the chain of communication between the classroom and the outside world.[39]

The School, of course, argues that it has the right to dictate what petitioners may or may not say to students, parents, or the community at large because it is a private institution, with rights of free association and private property. If the School were an ordinary private school, that argument would have more appeal. Society is undoubtedly better off for the fact that

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[38] In fact, the Affidavit of Petitioner Klug states, at paragraph 3: "The Town of Brookline...has no educational programs which can meet the special needs of the students which it refers to the School, within its public school system." J.A. 83. *See* note 13, *supra*.

[39] It is important to note that the censorship here was based strictly on the content of petitioners' speech. Thus, unlike *Marsh* or *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), the issue here is not whether petitioners will have to select a different time, place, or manner to communicate their message, but whether they will be heard at all.

private citizens who are dissatisfied with public education have the right to invest their time and money in the establishment of private schools and have done so. Such schools provide a healthy alternative to a homogeneous public school system. In fact, teachers who ordinarily choose to teach in such schools might very well do so for the express purpose of escaping from what they perceive to be the orthodoxy and bureaucracy of public education. For all these reasons, traditional private schools should ordinarily be given as much breathing room as possible, so as not to discourage concerned citizens from continuing to establish and support them.

The School is not, however, an ordinary private school. It is dependent upon the state for its students and funds, and thus for its very existence. Students who attend it did not, in any meaningful sense, choose it for its diversity, but because suitable public education was not available to them in their local public schools. By accepting these students and the public funds which accompanied them and assuming the responsibility for providing them with the education which is theirs by right, the School knowingly and willingly became part of the state's public education system and made itself accountable to the students, to their parents, and to all citizens whose tax dollars support that system. It did not have to do so. It need not do so in the future. But as long as the School continues to assume this responsibility for the education of the state's public school children, it cannot reasonably expect to enjoy the same privacy and free association rights as a truly private school.

It is therefore clear in this case that the rights of petitioners to express their opinions concerning matters affecting the education of students assigned to the School must prevail over the asserted right of the School to insist that petitioners maintain their silence. This is not to say that free speech is, in the abstract, more important than privacy or freedom of

association.[40] It is only to say that, in this particular clash of fundamental rights, it is both fair to the parties involved and in the best interest of society to afford petitioners the protection of the Fourteenth Amendment.

Conclusion

The judgment of the court of appeals in *Rendell-Baker*, affirming the judgment of the district court, should be reversed, and the case should be remanded for further proceedings. The judgment of the court of appeals in *Klug*, vacating the order of the district court and remanding with directions to dismiss the complaint, should be reversed, and the case should be remanded for further proceedings.

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[40] For example, given the same indicia of state action, the School's rights of privacy and association might well be entitled to priority over rights of free speech if the School's decision to discontinue purchasing supplies from an outspoken opponent of public education were challenged. This is yet another illustration of the point that the decision in a particular case will turn not just on the indicia of state action which are present or the type of rights which are at stake, but upon a careful analysis of interests in the context of the particular case in which they are asserted.

APPENDIX A

Constitutional, Statutory, and Regulatory Provisions

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts Constitution, Declaration of Rights, Article VII:

Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

STATUTORY PROVISIONS

United States Code, Title 42, Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (Supp. III 1979).

Massachusetts General Laws, Chapter 71B, Section 1:

The following words as used in this chapter shall, unless the context requires otherwise, have the following meanings: "Department", the department of education; "School age child", any person of ages three through twenty-one who has not attained a high school diploma or its equivalent; "School age child with special needs", a school age child who, because of temporary or more permanent adjustment difficulties or attributes arising from intellectual, sensory, emotional, or physical factors, cerebral dysfunctions, perceptual factors, or other specific learning disabilities or any combination thereof, is unable to progress effectively in a regular school program and requires special classes, instruction periods, or other special education services in order to successfully develop his individual educational potential; "Regular education", the school program and pupil assignment which normally leads to college preparatory or technical education or to a career; "Special education", educational programs and assignments, namely special classes, programs or services designed to develop the educational potential of children with special needs including but not limited to educational placements of children by school committees, the departments of public health, mental health, and youth services and the department of social services in accordance with the regulations of the

department of education; "School age child requiring special education", any child with special needs who requires special education as determined in accordance with the regulations set forth by the department.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 18. (9 Mass. Gen. Laws Ann. 184-85 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 2:

The department shall promulgate, in cooperation with the departments of mental health, public health and social services, regulations regarding programs for children with special needs including but not limited to a definition of special needs; provided, however, that such definition shall emphasize a thorough narrative description of each child's developmental potential so as to minimize the possibility of stigmatization and to assure the maximum possible development of a child with special needs, and, provided further, that such definition shall be sufficiently flexible to include children with multiple special needs. Children receiving or requiring special education shall be entitled to participate in any of the following programs: (1) additional direct or indirect instruction consultation service, materials, equipment or aid provided children or their regular classroom teachers which directly benefits children requiring special education; (2) supplementary individual or small group instruction or treatment in conjunction with a regular classroom program; (3) integrated programs in which children are assigned to special resource classrooms but attend regular classes to the extent that they are able to function therein; (4) full-time special class teaching or treatment in a public school building; (5) teaching or treatment at home; (6) full-time teaching or treatment in a special day school or other day facility; (7) teaching or treatment at a hospital; (8) teaching or treatment at a short or long term residential school; (9) occupational and pre-occupational training in conjunction with the regular occupational training program in a public school; (10) occupational and pre-occupa-

tional training in conjunction with full-time special class teaching in a public school building, at home, special day school or other day facility, hospital, or short or long-term residential school; (11) any combination or modification of programs (1) through (10) or other programs, services, treatments or experimental provisions which obtain the prior approval of the department.

Admission to such programs on the pre-school level at an earlier age than at which schooling is ordinarily provided shall be regulated by the department in conjunction with the departments of public health and mental health and shall be restricted to children with substantial disabilities who are judged by said departments to require such programming.

No child shall be assigned to a special education class unless it is first determined by an evaluation of the child's needs and the particular special education program that the child is likely to benefit from such program; periodically thereafter, and in no event less often than annually the child and his program shall be reevaluated to determine whether said child is benefiting from said program in accordance with the procedures set forth in section three. In the event that said program is not benefiting the child and that another program may benefit the child more, or said program has benefited the child sufficiently to permit reassignment, the child shall be reassigned, and in the event of consistent failure of a program to benefit children there assigned, the program shall be abolished or altered.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 19. (9 Mass. Gen. Laws Ann. 187-88 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 3:

In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health and public health and with assistance of the

department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise, every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education.

No school committee shall refuse a school age child with special needs admission to or continued attendance in public school without the prior written approval of the department. No child who is so refused shall be denied an alternative form of education approved by the department, as provided for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency or through any other program which is approved for the child by the department.

No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department.

Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining whether such child requires special education, the school committee shall notify the parents or guardians of such child in writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the

department and the departments of mental health and public health and the right to appeal from any evaluation, first to the department, and then to the courts.

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist.

The department jointly with the departments of mental health and public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the needs of the child is provided.

Those persons assessing said child shall maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education and medical treatment best suited to the child's needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counselling services. When the suggested course of study is other than regular education those persons assessing said child shall present a method of monitoring the benefits of such special education and conditions that would indicate that the child should return to regular classes, and a comparison of expected outcomes in regular class placement.

If a child with special needs requires medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available, in accordance with regulations promulgated jointly by the departments of education, mental health, public health and social services in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made according to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the departments of mental health and public health or, at private expense, from any specialists.

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluation, shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate education program. At the conclusion of said hearing, with the advice and consultation of appropriate advisory councils established under section one P of chapter fifteen, the department may recommend alternative educational placements to the parents, guardians or persons with custody, and said parents, guardians and persons with custody may either consent to or reject

such proposals. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parents, guardians or persons with custody except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

If the parents, guardians or persons with custody reject the educational placements recommended by the department and desire a program other than a regular education program, the matter shall be referred to the state advisory commission on special education to be heard at its next meeting. The commission shall make a determination within thirty days of said meeting regarding the placement of the child. If the parents, guardians or persons with custody reject this determination, they may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child shall be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

Within ten months after placement of any child in a special education program, and at least annually thereafter the child's

educational progress shall be evaluated as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned.

Evaluations and assessments of children and special education programs shall remain confidential and be used solely for the administration of special education in the commonwealth, including, but not limited to, inspection by the department and regional and state advisory councils to insure that every special education program does benefit the children there assigned.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 20. (9 Mass. Gen. Laws Ann. 188-91 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 4:

The school committee of any city, town or school district may, to meet its obligations under section three, with the approval of the department enter into an agreement with any other school committee to jointly provide special education or, subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, may enter into an agreement with any public or private school, agency, or institution to provide the necessary special education within the city, town or school district.

In the case of an agreement between school committees to jointly provide special education, said agreement shall designate one city, town or school district as the operating agent. Funds received by such operating agent from other cities, towns or school districts or appropriated by such operating agent for the purposes of such agreement, in addi-

tion to gifts and grants shall be deposited with and held as a separate account by its treasurer. The school committee may apply said funds to the costs of programs operated pursuant to the agreement without further appropriation.

St. 1972, c. 766, § 11. (9 Mass. Gen. Laws Ann. 193 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 5:

Any school committee which provides or arranges for the provision of special education pursuant to the provisions of section three shall pay for such special education personnel, materials and equipment, tuition, room and board, transportation, rent and consultant services as are necessary for the provision of such special education.

A school committee which incurs costs or obligations under the provisions of this section shall include within its annual budget an amount of money to comply with said provisions. Said amount shall be added to the annual budget appropriation for school purposes in each city or town for the support of public schools for the purposes of, and enforceable pursuant to, section thirty-four of chapter seventy-one, notwithstanding any general or special laws or charter provisions which limit the amount of money that may be appropriated in any city or town for school purposes.

St. 1972, c. 766, § 11, as amended by St. 1973, c. 318, § 1. (9 Mass. Gen. Laws Ann. 193 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 9:

The department, after consultation with the departments of mental health and public health, shall define the circumstances in which school committees may be required to provide special classes, instruction periods or other special education programs for school age children with special needs and shall provide standards for class size, curriculum, personnel and other aspects of special education for such children.

St. 1972, c. 766, § 11. (9 Mass. Gen. Laws Ann. 195-96 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 10:

The department may, on an annual renewal basis, upon the request of the parents or guardians and the recommendations of a local school committee and a regional branch of the division of special education, and with the approval of the secretary of educational affairs refer children requiring special education to any institution within or without the commonwealth which offers curriculum, instruction and facilities which are appropriate to the child's needs and which are approved by the department under regulations prescribed by the departments of education, mental health and public health. The curriculum at such an institution must for approval be equivalent, insofar as the department deems feasible, to the curriculum for children of comparable age and ability in the public schools of the commonwealth.

Before acting on said request the department shall determine the nature and extent of a child's special needs, shall require the local school committee and regional advisory council to prepare and submit plans detailing the time needed to establish facilities adequate for children with special needs in the city, town or school district where the child resides, and shall ascertain whether adequate facilities and instruction programs are available or when adequate facilities can be made available in the city, town or school district where the child with special needs resides. Until adequate facilities can be made available, such child shall be placed in the most adequate program available as determined by the department. The department shall further define by regulation the circumstances in which it shall be directly responsible for the placement of children in such special education programs, and by standards available to the public determine the methods and order of such placements; provided, however, that no child shall be denied access to any program operated by the department of mental health, public health or social services to which in the judgment of the operating department the child should be admitted.

The expenses of the instruction and support actually rendered or furnished to such children with special needs, including their necessary travelling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, may be paid by the commonwealth; but the department shall issue regulations jointly with the departments of mental health, public health, youth services and social services defining the circumstances in which the commonwealth shall bear all or part of such cost, the circumstances in which school committees shall be required to bear part or all of such cost, and the circumstances in which a parent or guardian may be required to reimburse the commonwealth for part or all of such cost; provided, however, that in no event shall the cost to the school committee for placement under this section be less than the average per pupil cost for pupils of comparable age within the city, town or school district; and, provided further, that in determining the cost to the parent or guardian, if any, no charge shall be made for any educational cost but only for support and care. In determining the cost to the parent or guardian the department shall apply criteria which take into account relative ability to pay.

The department shall direct and supervise the education of all such children, and the commissioner of education shall state in his annual report their number, the cost of their instruction and support, the manner in which the money appropriated therefor has been expended, to what extent reimbursed and such other information as he deems important.

Nothing contained herein shall affect the continued authority of the departments of mental health and public health over all non-educational programs and all treatment for residents or patients in institutions under their control.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 21. (9 Mass. Gen. Laws Ann. 196-97 (West Supp. 1981).)

REGULATORY PROVISIONS

603 Code of Massachusetts Regulations, Section 28, Paragraph 322.2 (1979):

Determination of need for special education; choice of prototype and program.

The Administrator of Special Education shall determine and state as part of the child's IEP whether the objectives set by the TEAM require for their achievement special education which is not available within the regular education program. The Administrator of Special Education shall state the reasons for the conclusion that the child does or does not require special education. If the child does require special education, the Administrator of Special Education shall complete the child's IEP by stating the prototype through which the child's program is to be provided and the specific program within such prototype. This decision regarding prototype and program shall be based on the type of services which are to be provided to the child, the types of group settings in which those services are to be provided (¶ 322.1(j)), the personnel who are to provide the services (¶ 322.3(a)), and the locations at which the services are to be provided (¶ 322.3(b)). The prototype selected shall be the least restrictive prototype which (by its terms set out in ¶ 502.0) allows the services recommended by the TEAM to be provided in the groups, by the personnel and at the locations chosen pursuant to ¶¶ 322.1(j), 322.3(a) and 322.3(b). Unless the child is to be placed in a Regional Adolescent Program under ¶ 502.7(b)(iv), the Administrator shall not select prototypes 502.7 (home or hospital), which is chosen only by a physician pursuant to ¶ 502.7(a); or 502.9 (diagnostic program) which is selected by the TEAM pursuant to ¶ 323.4. The Administrator of Special Education shall recommend a specific program and service for a child only after the evaluation of the adequacy of said program or service indicates that the program or service can provide elements required in the child's IEP.

603 Code of Massachusetts Regulations, Section 28, Paragraph 502.4(i) (1979):

Notwithstanding ¶ 502.4(h), a school committee may operate a substantially separate special education program in a facility other than a public school regular education facility, provided that the program is reviewed and approved by the Regional Branch Office of the Division prior to implementation. Such review and approval shall be required annually, as part of the school committee's annual program plan under ¶ 501.2. A program approved under this paragraph shall be considered more restrictive than a ¶ 502.4 program conducted in a public school regular education facility, and less restrictive than a program under ¶¶ 502.5 or 502.6. ...

603 Code of Massachusetts Regulations, Section 28, Paragraphs 804.0-804.6 (1979):

Requirements of contracts between school committees and private schools.

Each contract between a school committee and a private school, for the provision of all or part of the program of a child in need of special education, shall include the following requirements which such private school must meet:

804.1 The private school shall comply with all elements of the IEP for the child in need of special education and shall provide, in writing, to the Administrator of Special Education who recommended the placement, detailed documentation of such compliance. The private school shall send a copy of such documentation to the appropriate Regional Branch Office of the Division.

804.2 At least once every three months, the private school shall review the progress of each child in need of special education toward meeting the criteria, set by the Administrator of Special Education, for placement of such child in a less restrictive program prototype. If such child has met the criteria, the private school shall, in writing, so notify the Administrator of Special Education.

804.3 The private school shall allow the school committee which has placed a child in it to monitor and evaluate the education of such child in need of special education and shall make available to authorized school personnel from the responsible school system any records pertaining to the child in accordance with the Massachusetts Student Record Regulations.

804.4 The private school shall allow each school committee which has placed a child in it to inspect its facilities and to observe its operation at any reasonable time.

804.5 The private school shall comply with all other applicable requirements of these regulations, and the guidelines for approval of private schools, policy statements and directives issued by the Division in furtherance of this Chapter.

804.6 No school committee shall contract with any private school that discriminates on the ground of race, color, religion, or national origin, or that discriminates against qualified handicapped persons.

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No. 80-2102

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

SHEILA RENDELL-BAKER,
Petitioner,

v.

SANDRA KOHN, ET AL.,
Respondents,

WAYNE KLUG, ET AL.,
Petitioners,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,
Respondents

BRIEF OF RESPONDENTS BELLOTTI AND HIGHGAS

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QUESTION PRESENTED

Whether the dismissal of a teacher by a private school which contracts to provide special education in return for public funds is state action for purposes of the Fourteenth Amendment?

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STATEMENT OF THE CASE

Prior Proceedings

Petitioner Sheila Rendell-Baker filed this action for injunctive relief and for damages on July 28, 1977, J.A. 6; P.A. 10,[1/] to redress her discharge as a teacher and vocational counselor at the New Perspectives School, Inc., a private secondary high school for students who have had difficulty completing an ordinary high school. P.A. 3. Violations of the First, Fifth, and Fourteenth

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1/ The abbreviations in this brief conform to those adopted by the Petitoners:

Appendix A to Petitioners' Brief	A.
Joint Appendix	J.A.
Petition for Certiorari Appendix	P.A.
Rendell-Baker Record	R.R.

Amendments to the United States Constitution and 42 U.S.C. §1983 (1976) were alleged on the basis that, among other things, Ms. Rendell-Baker was terminated without due process for exercising her right to free speech. J.A. 76-78; P.A. 2. The original defendants to this suit were New Perspectives School, Inc.; the Director and members of the Board of Directors of New Perspectives, individually and in their official capacities; Francis X. Bellotti, the Attorney General of the Commonwealth, solely in his capacity as Chairman of the Massachusetts Committee on Criminal Justice; Robert J. Kane, solely in his capacity as Executive Director of the Massachusetts Committee on Criminal Justice; and certain federal

officials, solely in their capacity as officials of the United States Law Enforcement Assistance Administration. J.A. 72.

On April 12, 1979, the district court allowed the federal defendants' motion to dismiss. J.A. 11; P.A. 10. William Highgas, Jr., defendant Kane's successor as Executive Director of the Committee on Criminal Justice, was subsequently added as a party defendant in substitution for defendant Kane. J.A. 14; P.A. 10; Fed. R. Civ. P. 25(d)(1).

Following extensive discovery, Bellotti and Highgas, who were defendants because of their involvement with the Committee on Criminal Justice, filed a motion for summary judgment which the

plaintiff Rendell-Baker opposed. J.A. 13; P.A. 10. This motion was allowed on April 16, 1980. J.A. 14; P.A. 10. Because the district court (Caffrey, C. J.) granted summary judgment on the basis of a conclusion that there was no state action involved in the firing of plaintiff Rendell-Baker, the case was ordered dismissed not only as to the moving state parties, but as to all remaining private defendants. Rendell-Baker v. Kohn, 488 F. Supp. 764, 767 (D. Mass. 1980); J.A. 14; P.A. 37-39. Summary judgment was affirmed by the United States Court of Appeals for the First Circuit in an opinion dated February 12, 1981. Rendell-Baker v. Kohn, 641 F.2d 14 (1st

Cir. 1981); J.A. 2; P.A. 1-26.[2/] On October 13, 1981, the Court granted the petition for a writ of certiorari to review this case, J.A. 2, notwithstanding the state defendants' argument that resolution of the case depends upon an application of settled legal principles

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2/ The First Circuit Court of Appeals consolidated with the Rendell-Baker appeal, an appeal of the denial of a motion to dismiss in a related case, Klug et al. v. New Perspectives School, Inc., et al., No. 80-1451 (P.A. 40-57). J.A. 4; P.A.2. The Klug matter also involved the dismissal of teachers from New Perspectives School but, unlike the Rendell-Baker case, did not name any state officials as defendants. J.A. 20-29; P.A. 11. In the same opinion that affirmed the judgment in Rendell-Baker, the court of appeals reversed the order of the district court (Mazzone, D.J.) denying defendants' motion to dismiss in Klug. J.A. 4; P.A. 26.

to a unique factual situation.[3/]

Statement of Facts

New Perspectives School, Inc. (New Perspectives) is a nonprofit Massachusetts corporation operating as a private secondary school for troubled students. J.A. 75; P.A. 3. The school is located on privately-owned property in the Town of Brookline, Massachusetts. P.A. 3. It is operated by a Board of Directors, no member of which is a government official or was chosen by any government official or governmental body. Id.

3/ The plaintiff-teachers in the Klug case joined Ms. Rendell-Baker in filing the petition for a writ of certiorari and a brief on the merits. This reply brief is limited to addressing arguments pertinent to the Rendell-Baker case, since respondents Bellotti and Highgas are not parties to the Klug case (J.A. 20-29).

Approximately fifty students attend the school on a tuition free basis. Id. While students could come to the school through private referral sources or on their own initiative, most are referred by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health or by local school committees under Chapter 766 of the Massachusetts Acts of 1972, Mass. Gen. Laws Ann. ch. 71B, §§1-14 (West Supp. 1981). J.A. 90; P.A. 3-4. This law (commonly referred to as Chapter 766) makes available to all special needs students in Massachusetts the opportunity to receive publicly-financed education programs designed to meet their needs. Mass. Gen. Laws Ann. ch. 71B, §§2-5 (West Supp. 1981); A. 3-10. The statute also sets

forth a process for evaluating and placing children with such needs in public or private schools. Id.

At the time Ms. Rendell-Baker was dismissed, New Perspectives received substantial government funding. J.A. 86; P.A. 4. The vocational education program out of which Ms. Rendell-Baker was paid was funded by the federal Law Enforcement Assistance Administration, J.A. 87; P.A. 4 n.4, 7, which channeled its funds through the Massachusetts Committee on Criminal Justice. J.A. 75, 92-104; P.A. 7. The school was also subject to various governmental requirements, J.A. 87, 90; P.A. 5-6, one minor example of which was approval by the Committee on Criminal Justice of staff

hiring in the school's vocational program. J.A. 105; P.A. 7. This prior approval was limited to reviewing resumes submitted by New Perspectives in order to ensure that applicants for vocational positions satisfied the qualifications proposed by the school. J.A. 105; P.A. 8. Neither Bellotti nor Highgas nor anyone else associated with the Committee on Criminal Justice interviewed applicants or exercised any subjective judgment in the hiring process, nor did they participate in or impose conditions upon the school with respect to termination of New Perspectives' employees. J.A. 106; P.A. 7, 25. Those matters were exclusively the province of New Perspectives School, Inc.

On January 3, 1977, Ms. Rendell-Baker was terminated from her position as voca-

tional counselor at New Perspectives by Sandra Kohn, Director of the school. J.A. 76. Ms. Rendell-Baker had been employed by the school for approximately one year from January, 1976, to January, 1977. J.A. 73-74; P.A. 8. Just prior to her termination, she had voiced support for reinstitution of a student-staff council through which students could participate in the school's personnel decisions. A. 8. Students had presented a petition seeking reinstitution of the council at a meeting of the school's Board of Directors and had encountered opposition from Director Kohn. Id.[4/]

4/ Respondents Bellotti and Highgas have no knowledge of these facts, but have accepted this account of Ms. Rendell-Baker's dismissal for purposes

(footnote continued)

Ms. Rendell-Baker's protest of her discharge prompted two discrete responses, one private and the other governmental. First, the school appointed a grievance committee to hear her grievances. A. 9. Second, a representative of the Committee on Criminal Justice sought, prior to approving a new candidate to fill Ms. Rendell-Baker's position, information concerning the rules and regulations under which the action was taken. Id. While the Committee did not have authority for exercising this oversight, P.A. 7, 25,[5/]

(footnote continued)

of their motion for summary judgment on the grounds that state action is lacking.

5/ See pp. 8-9 supra.

such a response was nevertheless provided, and the Committee indicated that it was satisfied.

SUMMARY OF ARGUMENT

This Court has previously articulated the standards against which the activities of private parties should be measured in seeking to equate that conduct with state action for purposes of applying the strictures of the Fourteenth Amendment. Ms. Rendell-Baker seeks a dramatic modification of those standards in at least three respects. First, her arguments would weaken the tradition and exclusivity components of analysis under the public function doctrine. Second, they would obviate the requirement that there be a sufficient

nexus between the challenged private conduct and the asserted public function. Third, her contention that a balancing of interests should apply to the threshold determination of state action threatens to eliminate the basic proposition that the Fourteenth Amendment does not apply to private conduct, however discriminatory or wrongful. In the three major subdivisions of this brief, the Respondents Bellotti and Highgas demonstrate that the modifications in standards sought by Ms. Rendell-Baker are inconsistent not only with the prior opinions of this Court, but also with the underlying principles of the Fourteenth Amendment.

Ms. Rendell-Baker contends that New Perspectives, a private high school for

troubled teenagers, is a state actor because it performs a public function in educating special needs children placed by local school committees and funded by public monies. This contention ignores the requirements discussed in Part I that a private entity must exercise a power traditionally and exclusively reserved to the State in order for state action to exist under the public function theory. Private activity which parallels a traditional state function, or which partially performs the function without wholly displacing it, does not give rise to state action under the public function doctrine.

Whether the asserted public function in this case is broadly defined as special education or limited to the

provision of Chapter 766 education by New Perspectives School, the required components of tradition and exclusivity are lacking. Private secondary schools providing special education have historically served as an alternative to the provision of special education by public schools. Indeed, prior to the enactment of the current version of Chapter 766, children with special needs were routinely excluded from public schools. Under the current version of the statute, parents still retain the prerogative to opt-out of the Chapter 766 program and enroll their children in private schools at their own expense, and private schools still play a role in providing state-subsidized education to special needs children through

contractual arrangements with cities and towns under the Chapter 766 program.

Nor has the private sector wholly displaced the public provision of special education. Private school placements are not favored under Chapter 766. As a result relatively few students are placed in private schools under the Chapter 766 program. Insofar as New Perspectives is concerned, Chapter 766 students do not constitute its entire student population; students may come to the school through private referrals or on their own initiative. New Perspectives therefore retains a private identity independent of its participation in the Commonwealth's Chapter 766 program. The provision of special education, then, both as a matter of history and

current practice, involves both public and private schools. One cannot consider New Perspectives nor any private provider of special education to be a state actor because it performs a public function without ignoring the twin requirements of tradition and exclusivity, previously imposed by this Court.

Part II assumes, for the purposes of argument, that New Perspectives does perform a public function in providing special education to students placed and funded by the Commonwealth and its political subdivisions. Even if this were the case, the school does not become a state actor for all purposes. Its status as a state actor would be limited to those matters which involve an exercise of this putative public function.

The termination of Ms. Rendell-Baker stemmed from advocacy of student participation in New Perspectives' hiring and firing of teachers. The termination was therefore unrelated to New Perspectives' contracted obligation to provide special education. Accordingly, the school cannot be said to be a state actor with respect to that termination unless the Court is willing to make private parties performing public functions answerable in the federal courts for all of their conduct.

Finally, while Petitioner Rendell-Baker advances a new theory of state action which incorporates a balancing of the interests competing in any particular case, it is submitted in Part III that such a balancing of interests

is inappropriate prior to a determination that public rather than private action exists. If a balancing of interests test has any place in Fourteenth Amendment analysis, it is only in deciding the merits of a claim. A threshold inquiry as to the presence of state action remains necessary in order to maintain the Fourteenth Amendment's "essential dichotomy" between deprivations by the State, on the one hand, and private conduct, on the other.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT APPLY TO THIS CASE BECAUSE NEW PERSPECTIVES IS A PRIVATE ENTITY WHICH DOES NOT PERFORM A PUBLIC FUNCTION.

Petitioner Rendell-Baker claims she was dismissed as a teacher and vocational education counselor at New Perspectives in violation of her rights to free speech and due process under the Fourteenth Amendment to the United States Constitution.[6/] In order to establish the federal court's jurisdiction over her Fourteenth Amendment claims, Ms. Rendell-Baker must demonstrate that the action

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6/ Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

of New Perspectives in terminating her employment "may be fairly treated as that of the State itself."[7/] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). Such a demonstration is required because the Fourteenth Amendment does not address private conduct. Shelly v. Kraemer, 334 U.S. 1, 13 (1948). Accord, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 174 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-22 (1961). See Part III infra.

7/ This is true whether the Petitioner grounds her claims directly on the Fourteenth Amendment in order to establish the court's jurisdiction under 28 U.S.C. §1331 (1976) or attempts to frame a cause of action under 42 U.S.C. §1983 (1976) in order to secure jurisdiction under 28 U.S.C. §1343 (1976). A. 72-73. See United States v. Price, 383 U.S. 787, 794 n.7 (1966).

Although this state action principle was first articulated in The Civil Rights Cases, 109 U.S. 3 (1883), its application to the infinite variety of relationships between private entities and the public sector has proven difficult. Burton, 365 U.S. at 723. Thus, the Court has adopted different modes of analysis in exploring state action questions. E.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (searching for nexus between state regulation of private utility company and utility's termination of service to one of its customers); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)(itemizing indicia of state insinuation into activities of private restaurant which leased space in

publicly-owned parking facility); Smith v. Allwright, 321 U.S. 649 (1944) (analyzing whether the Democratic Party's conduct of primary elections constituted the exercise of a public function). Petitioner Rendell-Baker patterns her claim of state action on the Smith v. Allwright approach, contending that New Perspectives is a state actor because it performs a public function in educating special needs children placed by local school committees and funded by public monies pursuant to Chapter 766. For the following reasons, Petitioner Rendell-Baker errs in concluding that New Perspectives' contractual involvement in the Commonwealth's Chapter 766 program constitutes the exercise of a public function.

A. A Public Function Must Be Traditionally And Exclusively Performed By the State.

While private individuals or groups who are endowed with powers or functions governmental in nature may become state actors, Evans v. Newton, 382 U.S. 296, 299 (1966), not every agency or contractual relationship with the State is sufficient to cause this transformation. In Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974), the Court reviewed previous holdings in which state action had been found to exist under a public function theory and observed that in each of those cases a private entity had exercised a power "traditionally exclusively reserved to the State."

Jackson, 419 U.S. at 352.[8/] That these criteria constitute prerequisites to a conclusion of state action under the public function doctrine was made clear in Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), where the Court rejected the contention that the settlement of disputes between debtors and creditors is traditionally and exclusively a public function. In so doing, the Court cautioned against an unduly broad reading of earlier cases and reaffirmed the requirement that a function must be both traditionally and exclusively reserved to the State before its performance by a

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8/ The cases reviewed include Nixon v. Condon, 286 U.S. 73 (1932); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Evans v. Newton, 382 U.S. 296 (1966).

private entity would generate state action. Flagg Bros., Inc., 436 U.S. at 157-58.

Furthermore, the Court indicated that exclusivity itself exists only if a two-pronged test is satisfied. First, the public function must be "exclusively reserved to the State," as are elections of public officials. Second, the private entity must assume responsibility for the entire public function at issue, as when a political party conducts primary elections which produce "the uncontested choice of public official," Flagg Bros., Inc., 436 U.S. at 158, quoting Terry v. Adams, 345 U.S. 461, 484 (1953) (Clark, J., concurring),[9/] or when a private

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9/ It is significant that the Court in Flagg focused on the fact that the Jaybird Democratic Association in Terry

(footnote continued)

company takes complete responsibility for the streets of a company-owned town, performing all necessary municipal functions, Flagg Bros., Inc., 436 U.S. at 158-59, citing Marsh v. Alabama, 326 U.S. 501 (1946). Cf. Hudgens v. NLRB, 424 U.S. 507 (1976) (shopping malls do not displace traditional, municipally-controlled forums for communication to the extent necessary to constitute state action). In sum, private activity which parallels a traditional state function or which partially performs the function

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"effectively performed the entire public function of selecting public officials." Flagg Bros., Inc., 436 U.S at 158. This focus represents a narrowing of the Court's earlier willingness to conclude state action in the delegation of "an aspect" of the elective process to private groups. Evans v. Newton, 382 U.S. 296, 299 (1966).

without wholly displacing it does not give rise to state action under the public function doctrine. McCoy, Current State Action Theories, the Jackson Nexus Requirement and Employee Discharges by Semi-Public and State-Aided Institutions, 31 Vand. L. Rev. 785, 801 (1978) [hereinafter cited as McCoy].10/

10/ This conclusion is not undermined by the finding of state action in Evans v. Newton, 382 U.S. 296 (1966), which was based upon the Court's characterization of the recreational park at issue as predominantly municipal in character and "plainly" in the public domain. The Court explained in Flagg Bros., Inc., that its earlier holding in Evans rested on a finding of "ordinary state action under extraordinary circumstances." Flagg Bros., Inc., 436 U.S. at 159 n.8. These circumstances involved the city's continued involvement in the maintenance of the park after its operation was transferred to private trustees. Id.

B. Special Education Is Not Traditionally And Exclusively Performed By the State.

Whether the asserted public function in this case is broadly defined as special education or limited to the provision of Chapter 766 education by New Perspectives School, the required components of tradition and exclusivity are lacking.[11/] Private secondary

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11/ Petitioner Rendell-Baker defines the function at issue in this case not as special education or the provision of Chapter 766 education by New Perspectives, but as public education and/or public financing. Petitioners' Brief at 18-19, 22, 24. Insofar as public education is concerned, this characterization assumes the existence of a public function, thus accepting as a premise the very question at issue in the case. Insofar as public financing is concerned, Petitioner Rendell-Baker substitutes for a public function what is merely one indicia of state action. The fact that the state "exclusively retains the power and duty to spend public funds to provide Chapter 766 education," id. at 24, is to

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schools providing mainstream and special education have historically served as an alternative to public education, a role that has been both recognized and protected by this Court. See Pierce v. Society of Sisters, 268 U.S. 510 (1925). Accord, Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (White, J., concurring). Thus, even though education may be administered with "a greater degree of exclusivity by States and municipalities than has the function of so-called 'dispute resolution,'" Flagg Bros. Inc., 436 U.S. at 163, that degree is simply not sufficient to render education a public

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(footnote continued)

be expected, given the public source of the financing. That fact adds nothing to the analysis required by the Fourteenth Amendment.

function for state action purposes.[12/]

Indeed, as one lower court has observed, "education, even at the primary and secondary levels, has never been a state monopoly in the United States. As a historical matter, the widescale private development of higher education in this country preceded state entry into the field by more than a century."

12/ Given the public and private components of education, Petitioner Rendell-Baker's reliance on cases involving public schools, alone, is misplaced. See e.g., Ambach v. Norwick, 441 U.S. 68 76 (1979); Foley v. Connelie, 435 U.S. 291, 297 (1978); National League of Cities v. Usery, 426 U.S. 833, 835 (1976); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Brown v. Board of Education, 347 U.S. 483 (1954). While those cases recognize that public education is a traditional governmental function, that observation has no bearing on the threshold issue presented in this case: whether education financed by the State, but provided by a private entity, is public education.

Greenya v. George Washington University, 512 F.2d 556, 561 n.10 (D.C. Cir. 1975), cert. denied, 423 U.S. 995 (1975).

Nor has the public sector played an exclusive role in the education of special needs children. To the contrary, Chapter 766 was enacted to redress the traditional non-involvement of public schools in the education of special needs children. As the First Circuit noted, "it is only recently that public school systems have assumed any responsibility for children with special needs, until a few years ago such children were routinely excluded from public schools." P.A. 22. This routine exclusion was statutorily permitted under the predecessor version of Chapter 766. See 1954 Mass. Acts 514, §5, making special

education a public responsibility only in towns where there were five or more mentally retarded children. Petitioners' Brief at 23.

Although the current version of Chapter 766 makes public financing for an educational program available to every special needs child, it is implicit in Chapter 766 that if a child's parents do not agree with the educational plan devised by the local school committee and approved at the administrative appeals level, they are free to provide their child, at their own expense, with an alternative educational program in a private school. Commonwealth v. School Committee of Springfield, 1981 Mass. Adv. Sh. 502, 514, 417 N.E.2d 408, 415 (1981). Obviously, private schools such

as New Perspectives also participate in providing publicly-funded special education. Chapter 766 and its implementing regulations allow localities to contract with private schools to provide special education for children whose needs cannot be met by programs available in public schools. Mass. Gen. Laws Ann. ch. 71B, §4 (West Supp. 1981);A. 9. 603 Code Mass. Reg. §28, Paragraphs 804.0-804.6 (1979);A. 14. School Committee of Springfield, 1981 Mass. Adv. Sh. at 505, 417 N.E.2d at 410.[13/] These examples of private involvement in special edu-

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13/ These provisions grant official recognition to the private status of schools such as New Perspectives which

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cation demonstrate that Massachusetts and its political subdivisions have neither traditionally nor exclusively appropriated the responsibility to educate special needs children.

While the role of public schools in the education of special needs children has been neither traditional nor exclusive, in recent years public schools have assumed a greater share of this responsi-

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(footnote continued)

contract to provide Chapter 766 education. Rendell-Baker v. Kohn, 641 F.2d 14 (1st Cir. 1981). P.A. 17. In doing so, the provisions support the notion that a private school is not automatically rendered a public entity for state action purposes by virtue of performing a statutorily-mandated function. See e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925); Berrios v. Inter American University, 535 F.2d 1330, 1332 (1st Cir. 1976).

bility. Maximized public involvement is "impliedly required" by Chapter 766 and "explicitly mandated" by the statute's implementing regulations, with private school placements "permitted only as a necessary alternative." School Committee of Springfield, 1981 Mass. Adv. Sh. at 506, 417 N.E.2d at 410. Given this presumption against private placements, schools such as New Perspectives provide special education to relatively few Chapter 766 students. Id. at 507 n.8, 417 N.E.2d at 411 n.8.[14/]

14/ This limitation upon private placements safeguards against the use of private schools as vehicles for avoiding Fourteenth Amendment responsibilities. Thus, this case is distinguishable from decisions involving the evasion of equal protection guarantees through assistance to private entities. E.g., Gilmore v. City of Montgomery, 417 U.S. 556 (1974);

(footnote continued)

Accordingly, there exists no possibility that private schools will displace public schools in the provision of Chapter 766 education or exclusively assume responsibility for educating special needs students. New Perspectives therefore stands in a different posture with respect to Chapter 766 education than did the Jaybird Party in Terry v. Adams, 345 U.S. 461 (1953), with respect to the election of public officials, or the

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Evans v. Newton, 382 U.S. 296 (1966); Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964); Smith v. Young Men's Christian Association of Montgomery, 462 F.2d 634 (5th Cir. 1972), aff'd as modified, id., 316 F. Supp. 899 (M.D. Ala. 1970). See McCoy, 31 Vand. L. Rev. at 805(2); Burke and Reber, State Action, Congressional Power And Creditors' Rights: An Essay On the Fourteenth Amendment, 46 S. Cal. L. Rev. 1003, 1065 (1972).

Gulf Shipbuilding Corporation in Marsh v. Alabama, 326 U.S. 501 (1946), with respect to the performance of municipal functions.

Insofar as the student body of New Perspectives is concerned, there admittedly existed a relatively high proportion of Chapter 766 students during the 1976-1977 school year.[15/] Students, however, may also come to the school through private referrals or on their own initiative. P.A. 4. Thus, New Perspectives, like other private schools participating in the Chapter 766

15/ Chapter 766 students did not constitute the entire student population. Seven of the fifty students who comprised the student body that year were funded by the Massachusetts Division of Youth Services and the Department of Mental Health. J.A. 90.

program, has an identity independent of its participation in that program.[16/]

16/ This independent identity is reinforced by the fact that the regulations to which the school is subject would apply equally "to a private institution which contracted with the state to educate one student or to conduct one small program in return for a small amount of funds." Rendell-Baker v. Kohn, 641 F.2d 14, 25 (1st Cir. 1981). P.A. 20. Surely such a limited contract would not transform a private school into a state actor.

The school's public funding likewise presents no barrier to its status as an entity independent of the government. Chapter 766 funding is considered as "a matter of law" to flow to individual special needs students and only secondarily and indirectly to the private school which educates them. See School Committee of Springfield, 1981 Mass. Adv. Sh. at 518, 417 N.E. 2d at 417. The funding for Ms. Rendell-Baker's position is similarly inconsequential, since it originated from the federal government and therefore must be discounted for state action purposes. See Molinar v. Western Electric Co., 525 F.2d 521, 532 (1st Cir. 1975), cert. denied, 424 U.S. 978 (1976). Perhaps for these reasons

(footnote continued)

Given this independent identity, a conclusion that New Perspectives is a state actor which performs a public function in providing publicly-financed special education would require that all private schools which contract to provide special education under the Chapter 766 program be considered state actors, regardless of the size of their Chapter 766 population. Such a result, in turn, would enervate the limitations of tradition and exclusivity which this Court has imposed upon the public function doctrine and therefore endanger the principle of private autonomy which underlies those limitations.

(footnote continued)

Petitioner Rendell-Baker does not rely upon government regulation and funding as grounds for urging a conclusion of state action.

II. ASSUMING NEW PERSPECTIVES DOES PERFORM A PUBLIC FUNCTION, THE TERMINATION OF MS. RENDELL-BAKER DID NOT INVOLVE AN EXERCISE OF THAT PUBLIC FUNCTION.

Assuming, arguendo, that New Perspectives does perform a public function in providing special education to students placed and funded by the Commonwealth, the school does not become a state actor for all purposes. Its status as a state actor is limited to those matters which involve an exercise of the public function. Since the termination of Ms. Rendell-Baker is unrelated to the school's provision of Chapter 766 education, the school was not a state actor with respect to that termination.

The Court's mode of analyzing state action issues involving the delegation of governmental obligations is most explicitly set out in Smith v. Allwright, 321 U.S. 649, 663 (1944), where the Court concluded that state action did exist with respect to the delegation to the Democratic Party of the State's responsibility to conduct primary elections. Rather than subject the Party to constitutional constraints with respect to all of its activities, the Court concluded that state action existed only "insofar as [the Party] determines participants in a primary election." Id. See also Terry v. Adams, 345 U.S. 461 (1953). By limiting its holding to matters involving the actual electoral process, the Court

made clear that the specific action challenged must itself involve the exercise of a delegated governmental responsibility in order for constitutional safeguards to apply. Similarly, in Evans v. Newton, 382 U.S. 296 (1966), the Court concluded that state action existed when a municipal park was transferred to private trustees, suggesting that the operation of the park was a function governmental in nature. It is significant that the specific action challenged in Newton -- restriction of the park to whites -- related directly to the operation of the park and, hence, to the public function.

The Court's so-called "municipal-function" case, Marsh v. Alabama, 326 U.S. 501 (1946), conforms to this

analytical approach. In that case state action was determined to exist in the context of a prohibition against the distribution of religious literature in the business district of a privately-owned town. The public function at issue in Marsh was the responsibility for operating an entire town. Marsh, 326 U.S. at 508-509. As with the operation of any municipality, that responsibility includes the provision of public areas for the exercise of free speech, whatever its content. Accordingly, the distribution of religious literature in the town's business district involved the exercise of a public function.

If one assumes that the Commonwealth has delegated a public function to New Perspectives, the foregoing cases make

clear that the school would be subject to constitutional provisions only as to matters relating to the school's responsibility to provide special education to students placed and funded by the Commonwealth. It could not be a state actor as to collateral matters which do not bear directly on the school's responsibility to provide publicly-funded and regulated special education. Indeed, Petitioner Rendell-Baker does not challenge this proposition, suggesting instead that her termination related directly to the school's performance of its public education responsibilities. Petitioners' Brief at 20 n.22, 35-38. Under this formulation of the case, the Court must decide whether the termination of a teacher for

open advocacy of student participation in a private school's general personnel matters is an activity directly related to the school's contracted obligation to provide special education.

The First Circuit concluded that the school was not subject to constitutional constraints in terminating Petitioner Rendell-Baker. Rendell-Baker v. Kohn, 641 F.2d 14 (1st Cir. 1981); P.A. 1-26. Its conclusion stemmed in part from a conviction that while the school might perform a public function with respect to its student body, it did not perform a public function in its contractual dealings with its faculty. Id. at 26; P.A. 23. Cf. Marsh v. Alabama, 326 U.S. 501 (1946) (existence of public areas in the town benefits individuals electing to exercise their right to free speech).

In other words, the First Circuit refused to conclude that state action existed under the public function doctrine because the required nexus between the asserted public responsibility for providing special education and the termination of the plaintiff was lacking.[17/] Cf. Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974) (detention of children by private child care institution constituted exercise of delegated public function); United

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17/ As one commentator has observed, the increasing reluctance of courts to find state action has resulted from a shift in the identity of plaintiffs from outside consumers of institutional services to employees challenging the internal management of private institutions. McCoy, 31 Vand. L. Rev. at 790.

States v. Wiseman, 445 F.2d 792 (2d Cir. 1971), cert. denied 404 U.S. 967 (1971) (delivery of false affidavits of service constituted exercise of public process-serving function).

This lack of nexus accurately reflects the Smith v. Allwright mode of analysis for two reasons. First, as the First Circuit noted, the school's authority over its faculty derives from a contractual relationship of employment, not from state law. Rendell-Baker v. Kohn, 641 F.2d at 26; P.A. 23. Given this derivation, personnel decisions in general are distinct from decisions involving the student body which relate to education matters.

Second, the underlying reason for the plaintiff's termination -- advocating student participation in faculty appointments and terminations[18] -- was itself a personnel matter rather than an issue bearing directly on the school's provision of special education. In this regard the termination of Petitioner Rendell-Baker may be contrasted to the dismissal of a teacher for conduct or speech in the classroom,[19] matters

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18/ See pp. 9-10 supra.

19/ Cf. McCoy, 31 Vand. L. Rev. at 823 ("A certain amount of freedom of speech for the teacher in the classroom might be judicially imposed on the private school administration, not as a matter of the teacher's fourteenth amendment rights but as a part of the students' fourteenth amendment interests in their state-aided education.").

which arguably could be related to a school's special education responsibilities.[20] Thus, the First Circuit's holding lies squarely within the analytical framework established by

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20/ The Court need not confront the potential breadth of this protected private speech because Petitioner Rendell-Baker's support of student participation in faculty appointments and terminations falls clearly outside its protection, notwithstanding her reliance upon Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Pickering v. Board of Education, 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960). While those cases recognize a close relationship between teacher free speech and the educational process, they do so in the context of a public school situation in which the existence of state action was not at issue. Reliance upon those holdings as a basis for making a preliminary finding of state action would transform this Court's expansive protection of public speech into a basis for applying First Amendment guarantees in private contexts. See Part III infra.

Smith v. Allwright, 321 U.S. 649 (1944), even though a resolution of state action in other types of actions might not.

Nor is it coincidental that the First Circuit concluded that there was an insufficient relationship for state action purposes between the Commonwealth's involvement in the operation of New Perspectives and the termination of Petitioner Rendell-Baker. Rendell-Baker v. Kohn, 641 F.2d at 27-28; P.A. 25-26.[21] To the contrary, it is logical that the state would not be extensively involved

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21/ The necessity for a nexus between the State and the challenged action of the regulated entity as a prerequisite to state action is clearly articulated in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

in matters unrelated to the school's alleged public function of providing special education. Cf. McQueen v. Druker, 438 F.2d 781, 784 (1st Cir. 1971) ("The stronger posture of government supervision present in this case is not unrelated to the fact that the government has chosen to attract the participation of private persons in carrying out a specific governmental purpose.").

A review of the statutory and regulatory provisions involving Chapter 766 reveals no substantive or procedural guidelines with respect to teacher terminations other than an open-ended requirement that schools should maintain written policies on personnel matters including dismissals. A. 2-15; P.A. 5-6, 20-21. Likewise, Committee on Criminal

Justice provisions which accompany funding for Ms. Rendell-Baker's position require limited approval of staff hiring and salary increases, but not of staff terminations. P.A. 7-825; J.A. 92-93, 105-107. The First Circuit specifically found nothing authorizing the Committee on Criminal Justice to oversee the discharge of an employee funded by the Committee, Rendell-Baker v. Kohn, 641 F.2d at 27, P.A. 25, and on this basis discounted Ms. Rendell-Baker's assertion that a Committee official had undertaken to oversee the manner in which the school discharged her, id. at 27-28; P.A. 25-56.

The foregoing analysis demonstrates that while New Perspectives' provision of special education may be funded and regulated by public sources, the govern-

ment has maintained a hands-off policy regarding the school's personnel practices. This non-involvement demonstrates, in turn, that even if the provision of special education pursuant to Chapter 766 constitutes a public function, the termination of Ms. Rendell-Baker is not sufficiently related to the exercise of that public function to transform New Perspectives into a public entity for state action purposes.

III. THE BALANCING OF COMPETING INTERESTS IS NOT AN APPROPRIATE STANDARD FOR THE THRESHOLD DETERMINATION OF STATE ACTION.

Citing an alleged lack of rational framework for determining when state action is present, Petitioners' Brief at 33, and the inadequacy of those guidelines previously enunciated by the Court, id. at 29, Petitioner Rendell-Baker would have the Court take this opportunity to disavow the traditional analysis of state action[22/] in favor of an analysis which calls for a balancing of those interests competing for protection

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22/ See also, Glennon and Nowak, A Functional Analysis of the Fourteenth Amendment State Action Requirement, 1976 Sup. Ct. Rev. 221.

in any given case.[23/] This proposed analysis, raised for the first time in Petitoners' Brief, is intended to set "appropriate limits to the scope of the Fourteenth Amendment," id. at 26, and would supplant state action theory,

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23/ Petitioners formulate their theory of state action as follows:

> Once the court determines that substantial indicia of state action are present, instead of trying to decide if the case is more like one case or another, it can move on to the less mechanical and more meaningful task of sorting out and weighing the competing interests at stake, to determine which is more deserving of protection upon the facts of the particular case at hand. Petitioners' Brief at 33-34.

Petitioners make it clear that while "substantial indicia of state action" may be present, the test should be utilized "whether or not any specific previously established guideline for determining state action is satisifed." Id. at 31.

as heretofore articulated by the Court.[24/] Respondents Highgas and Bellotti submit that balancing the asserted interests prior to a determination of the presence of state action is inappropriate and inconsistent with the principles underlying the Fourteenth Amendment.

The Court has clearly indicated over the years that in order to determine whether challenged activity constitutes a denial or deprivation of rights protected by the Fourteenth Amendment,

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24/ Prior proceedings in this case suggest that certiorari was sought in order to further define the public function doctrine in the context of a narrow set of facts. See Petition for Writ of Certiorari at 18. Petitioners' argument in Part IIB of their brief, however, is not confined to that subject.

the initial inquiry is necessarily whether there is state action. See, e.g., Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 n.4 (1978). This inquiry is required by the "essential dichotomy set forth in the Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974), quoting Shelly v. Kraemer, 334 U.S. 1, 13 (1948). Accord, Moose Lodge v. Irvis, 407 U.S. 163, 172 (1972). The distinction between public and private conduct was first enunciated in The Civil Rights Cases, 109 U.S. 3 (1883), and has been subsequently

reaffirmed. See Flagg Bros., Inc., 436 U.S. at 156; Jackson, 419 U.S. at 349; Moose Lodge, 407 U.S. at 172; Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-22 (1961); Shelly v. Kraemer, 334 U.S. at 13.[25/] Thus, when the challenged activity is that of a private person or entity, the Fourteenth Amendment requires a preliminary determination that the person or entity may be regarded as a state actor. See Part I supra. Only when state action is present must a court undertake the "ultimate inquiry," Flagg Bros., Inc.,

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25/ See also L. Tribe, American Constitutional Law, §18-2 at 1149 (1978) (by exempting private action from the reach of the constitution's prohibitions, [the state action requirement] stops the constitution short of pre-empting individual liberty . . .).

436 U.S. at 155 n.4, whether individual rights protected by the Fourteenth Amendment were abridged.[26/]

The balancing of competing interests presented in a particular case is appropriate only after the initial determination of state action is made and as part of the "ultimate inquiry" which a court must then undertake. See, e.g., Marsh v. Alabama, 326 U.S. 501, 509 (1946).[27/] See also Mt. Healthy City

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26/ Thus, in this case the district court assumed, for purposes of determining whether state action was present, that Ms. Rendell-Baker "was dismissed as a result of a legitimate exercise of her free speech and that her dismissal was not accompanied by the procedural safeguards which would be required if the action were attributable to the State." P.A. 29.

27/ While Petitioner Rendell-Baker cites Marsh in favor of her proposed

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Board of Ed. v. Doyle, 429 U.S. 274, 284 (1977); Pickering v. Board of Education, 391 U.S. 563, 568 (1968). The balancing test as propounded by Petitioner Rendell-Baker would lead to simple boot-strapping. Applying this test to the instant case, Petitioner would have the answer to the threshold inquiry (whether the conduct of the school and its Director can properly be attributed to the Commonwealth) subsumed into the second inquiry (whether Petitioner Rendell-Baker's dismissal was as the result of her legitimate exercise of free speech and, therefore, a violation of the

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(footnote continued)

analysis, it is important to note that the Court's balancing of competing interests in that case occured only after state action had been found.

Fourteenth Amendment). The logical result of the application of such a test, in some instances and perhaps in the instant case, might well be a determination of a Fourteenth Amendment violation where there are present (1) "substantial indicia" of state action, although not necessarily sufficient indicia to alone justify a determination of state action, and (2) a "substantial" impairment of a fundamental right, with no countervailing interest. Thus, "whether or not any specific, previously established guideline for determining state action is satisfied," Petitioners' Brief at 31,[28/] a balancing of interests may

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28/ See n.23 supra.

result in a finding of constitutional violation.[29/] This, it is submitted, contravenes the firmly established principle that the Fourteenth Amendment does not apply to private conduct and would only serve to obscure that Amendment's "essential dichotomy" between public and private conduct. Whether conduct is private or may be attributed to the State is a determination which must be made

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29/ Petitioners assert that their proposed analysis will provide "a rational framework of decision," Petitioners' Brief at 33, and, presumably, guidance in making state action determinations. A test, however, the application of which results in "identical indicia of state action" warranting "a determination of state responsibility under some circumstances but not others," id. at 32, would not lead to substantial certainity as to the standards by which state action may be found.

apart from a consideration of the interests which each party asserts.30/

It may be that "formulating an infallible test of state action is an impossible task." Reitman v. Mulkey, 387 U.S. 369, 378 (1967). "[W]hether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer." Jackson, 419 U.S. at 349-50. Accord, Moose Lodge, 407 U.S. at 172; Burton, 365 U.S. at 723. It is submitted,

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30/ This is not to say that the determination of state action is to take place in a vacuum. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton, 365 U.S. at 722. Thus, each case must be analyzed on its own facts in order to determine whether state action is present. This factual analysis, however, is distinguishable from a balancing of interests of the parties.

however, that the Fourteenth Amendment requires that an answer be found. The appropriate test to be applied to these facts is clear: there is state action which may be attributable to a private actor only (1) if there has been a delegation of a public function which is traditionally and exclusively performed by the State, Flagg Bros., Inc., 436 U.S. at 157-59; Evans v. Newton, 382 U.S. 296, 299 (1966), and (2) if the challenged conduct involves an exercise of that public function, Jackson, 419 U.S. at 351. This "sovereign-function doctrine" is one which Justice Rehnquist, writing for the majority in Flagg Bros., Inc., has said exists within "carefully confined bounds." Flagg Bros., Inc., 436 U.S. at 163. The Court should not

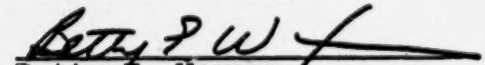
accept the invitation extended by Petitioner Rendell-Baker to use this case as an opportunity to articulate a wholly new doctrine of Fourteenth Amendment analysis, particularly a doctrine which would sweep within the ambit of the Amendment categories of private conduct previously excluded from its scope and would do so on the basis of a subjective balancing test.

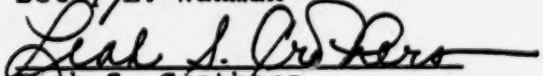
CONCLUSION

This judgment of the Court of Appeals in Rendell-Baker, affirming the judgment of the district court, should be affirmed.

Respectfully submitted,

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No. 80-2102

In the Supreme Court of the United States

OCTOBER TERM, 1981

SHEILA RENDELL-BAKER,
PETITIONER,
v.
SANDRA KOHN, ET AL.,
RESPONDENTS,

WAYNE KLUG, ET AL.,
PETITIONERS,
v.
NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to
The United States Court of Appeals
For The First Circuit

BRIEF FOR RESPONDENTS

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I

QUESTION PRESENTED

Does the Public Function Doctrine of State Action Transform a Private School Into a State Actor Because It Provides Educational Services to Special Needs Children at Public Expense?

II

PARTIES BELOW

The Court of Appeals for the First Circuit consolidated these two appeals from the District Court for the District of Massachusetts. In No. 80-1328 below, the plaintiff-appellant was Sheila Rendell-Baker; the defendants-appellees were New Perspectives School, Inc., Sandra Kohn (individually and as director of the school), the members of the Board of Directors of the school (individually and in their official capacities),[1] Francis X. Bellotti (as Chairman of the Massachusetts Committee on Criminal Justice), and William Highgas[2] (as Executive Director of the Massachusetts Committee on Criminal Justice). In No. 80-1451 below, the plaintiffs-appellees were Wayne Klug, Carolyn Anderson, Paul Stein, William Tilden, and Dawn Fonseca; the defendants-appellants were New Perspectives School, Inc., Sandra Kohn (individually and as director of the school), and the members of the Board of Directors of the school (individually and in their official capacities).[3]

---

[1] The individual members of the school's Board of Directors named in the *Rendell-Baker* complaint were Susan Alford, John Businger, Jackie W. Cooper, Stephen B. Goldenberg, Rodney Jackson, Joanne Neiman, James Schlesinger, Rina Wald Spence, Tonia Yee and Edward Zarsky.

[2] William Highgas was substituted as a named party after he succeeded Robert J. Kane, who was originally named in the complaint, as Executive Director of the Massachusetts Committee on Criminal Justice. Respondents Bellotti and Highgas are separately represented in these proceedings by the Attorney General of Massachusetts and have filed a separate brief.

[3] The individual members of the school's Board of Directors named in the *Klug* complaint were James W. Schlesinger, Stephen B. Goldenberg, Joseph Gartner, Joanne Neiman, David Bachrach, Rodney Jackson, Rina Wald Spence, Susan Alford, Rhoda Goodwin, Rina Hamberg, Tonia Yee, and Edward Zarsky.

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In the
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v.
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NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to
The United States Court of Appeals
For The First Circuit

BRIEF FOR RESPONDENTS

Opinions and Judgments Below

The opinion of the court of appeals for both cases as consolidated on appeal is reported at 641 F.2d 14 (1st Cir. 1981) and appears in the Petition for Certiorari Appendix at 1-26.

The Memorandum and Order for the District of Massachusetts in *Rendell-Baker* v. *Kohn, et al.*, No. 80-1328 below, is reported at 488 F. Supp. 764 (D. Mass. 1980) and also appears in the Petition for Certiorari Appendix at 27-39. The April 7, 1980 Memorandum and Order of the District Court for the District of Massachusetts in *Klug, et al.* v. *New Perspectives School, Inc., et al.*, No. 80-1451 below, is not reported and appears in the Petition for Certiorari Appendix at 40-57.

The judgment below in *Rendell-Baker* appears in the Petition for Certiorari Appendix at 58-59. The judgment below in *Klug* appears in the Petition for Certiorari Appendix at 60-61.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered in both appeals below on February 12, 1981. On May 4, 1981, this Court granted the petitioners' motion for an extension of time until June 12, 1981, within which to petition for certiorari. See 28 U.S.C. § 2101(c) (1976). The petition for certiorari was filed on June 12, 1981, and it was granted by an order dated October 13, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

Constitutional, Statutory, and Regulatory Provisions

The following constitutional, statutory, and regulatory provisions are set out hereto in Appendix A:

> United States Constitution, Amendment XIV, Section I; Massachusetts General Laws, Chapter 71B, Sections 1-5, 10; 603 Code of Massachusetts Regulations, Section 28, Paragraphs 205.1, 322.2, 504.4(a) (1979).

Statement of the Case

This case involves review of the single issue of whether the New Perspectives School, Inc. "may be fairly treated as . . . The State itself."[4] when it discharged petitioners who were staff members at the school. The issue hinges on the extent to which by its nature and function, the school can be said to be acting as the state itself rather than as a private entity, when it dismisses its personnel.

a. *The New Perspectives School*

The New Perspectives School is a small, non-profit school which offers a high school program to students who have had difficulty completing an ordinary high school. The school is organized as a non-profit corporation under the laws of Massachusetts and is located on privately owned property in the Town of Brookline, Massachusetts. The school is operated by a Board of Directors, no member of which is a government official or is chosen by any government official or governmental body. The school was initially set up with private funds but has become increasingly dependent upon public funds as they have become available.[5] This funding has been received from a variety of sources,[6] though the primary source for educational services comes from school committees' payments for services to students placed at the school under the so-called Chapter 766 statutory scheme (M.G.L. c. 71B, § 1 et seq.). Additional funds are received from private contributors and foundations but funds from the various governmental sources constitute 90% or more or the school's budget.[7]

The school services about 50 students all on a tuition-free basis. Virtually all the students have drug, alcohol or behavioral problems, or have other special needs, and have been referred to the

---

[4] *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

[5] *Rendell-Baker* v. *Kohn*, 641 F.2d. 14, 16-17, fn.1.

[6] Sources other than the Town of Brookline have been the Massachusetts Department of Mental Health, Department of Youth Services, Massachusetts Division of Family and Children's Services; Office for Children and Law Enforcement Assistance Administration (LEAA).

[7] See respondent Kohn's answers to interrogatories, Joint Appendix, 86 (hereafter abbreviated as J.A.).

school by the Town of Brookline or the City of Boston under Chapter 766 or by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. However, students could also come to the school through private referral sources or on their own, or their family's, initiative.

b. *The Statutory Scheme*

The school's role as a provider of special needs education may better be seen in the context of the statutory scheme through which it becomes eligible for public funding. Chapter 766 was passed to create "a comprehensive and complete program of evaluation and placement for children with special education needs."[8] The school committee must provide an appropriate, publicly supported education to each school-age child with special needs. M.G.L. c. 71B, § 2, 3-4; see Code Mass. Regs. § 28 et. seq. (1979),[9] regulations promulgated pursuant to the statute. After the school committee diagnoses and evaluates the needs of each child with special needs, an individualized education program is proposed. The program may range from extra help in a regular classroom to full-time placement in a day or residential school, M.G.L. c. 71B, § 2; 603 CMR, ¶322.2 (1979). The statute seeks to "mainstream" children as much as possible. However, where no appropriate program is available, the school committee, with the approval of both the child's parents and the Department of Education, is authorized to enter purchase of service contracts with private schools, agencies or institutions to provide the necessary special education. M.G.L. c. 71B, § 4, 10. *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 417 N.E.2d 408, 410 (1981). Although the private school is required to comply with the individual educational plan recommended for the child as well as with Chapter 766 regulations,[10] nothing in the statute or regulations imposes control over the private school's educational pro-

[8] *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 417 N.E.2d 408, 410 (1981), citing *Board of Education* v. *Assessor of Worcester*, 368 Mass. 511, 515, 333 N.E.2d 450 (1975).

[9] Hereafter, references to these regulations will be cited as "CMR."

[10] 603 CMR 804.1-804.6.

gam, policies or philosophy.[11] New Perspectives School, like all eligible private schools, is free to pursue its own particularized approach to educating these "problem" students. The school committee's role in the actual educational process ends with the child's placement at the private school. Even then, it is New Perspectives School which retains final authority regarding admission of a referred student.[12] Once a student is admitted by the school, the school committee has no intervention authority regarding the educational plan or program. If the school committee is displeased with implementation of the child's educational plan, its only recourse is to seek to remove the child from the school.[13] Similarly, the statute and regulations consistently shy away from intervention in the private school's administrative policies or actions, including personnel matters such as hiring and firing of staff members or teachers. Even the Massachusetts Department of Education's guidelines require only that the school have available in writing its current personnel policies and practices and speak not at all to the substance of that policy.[14] Such a written policy was adopted and in effect at new Perspectives School, including a comprehensive grievance procedure to review the actions of the Director, in, among other matters, discharging staff members.

---

[11] 603 CMR 803.1.

[12] 603 CMR 504.4(a).

[13] The regulations permit monitoring and evaluation and require regulatory compliance but vest no actual power or authority in the school committee to interfere with the program itself.

[14] *"Guidelines for the Approval of the Day Educational Component in Private Schools under Chapter 766"*, paragraph 201.01 (603 CMR). For a summary, see *Rendell-Baker, supra*, at 18. The guidelines are promulgated for conformity since the School must be approved by the Massachusetts Department of Education to receive placements and funding under Chapter 766. The school is also bound by its agreement with the Massachusetts Department of Mental Health, Drug Rehabilitation Division, but this contract makes no mention of personnel policies or rights of staff members. *Rendell-Baker, Id.* at 18. When the school accepts a child through the Boston School Committee, it is subject to a contract with the City of Boston. Other than subjection to the state conflict of interest law (M.G.L. c. 268A), the school "shall have no capacity to incur any liability on the part of the city. The Facility, its agents or employees shall not have the status or pension rights of a city employee . . .". Also, the school, not the city, assumes liability for claims "arising from any act or omission of the Facility, its agents or employees . . ." See *Rendell-Baker, Id.* at 18.

c. *The Discharge of Ms. Rendell-Baker*

Sheila Rendell-Baker was employed as a vocational counselor through funds provided by the LEAA under a grant which was channeled to the school through the Massachusetts Committee on Criminal Justice (MCCJ).[15] According to her complaint, in December, 1976, a controversy arose between a group of students and the school's director Ms. Sandra H. Kohn, related to the responsibilities of a student-staff council in the hiring of staff. The students presented a petition at a meeting of the Board of Directors. Ms. Rendell-Baker voiced support for their position, and Ms. Kohn voiced opposition. On January 3, 1977, without prior notice, Ms. Kohn requested that Ms. Rendell-Baker resign. When Ms. Rendell-Baker refused to resign, Ms. Kohn advised the MCCJ of her intention to discharge Ms. Rendell-Baker and thereafter dismissed her.[16] After her discharge and an exchange of letters, the school agreed to apply retroactively a newly adopted personnel policy, which provided for involuntary termination for specified causes, subject to review by a three-member grievance committee. The school's president appointed a grievance committee, but Ms. Rendell-Baker objected to its composition and demanded a formal hearing before a mutually agreeable committee. The school took no further action. After the dismissal, the school provided a

[15] The Committee's prior approval of hiring consisted of reviewing resumes submitted by the school to ensure that applicants' qualifications met the requirements established by the school in its proposal, and that the Committee did not interview applicants or exercise any subjective judgment in the hiring process. LEAA Circular A-87, provides in part:

> "Each grantee or contractor organization, in recognition of its own unique combination of staff facilities and experience, will have the primary responsibility for employing whatever form or organization and management techniques may be necessary to assure proper and efficient administration."

See Supplemental Affidavit of William Highgas, Jr., J.A. 105; "Principles for Determining Costs Applicable to Grants and Contracts with State and Local Governments", ¶2.c., J.A. 107.

[16] See the *Rendell-Baker* Record 63, 98.

satisfactory explanation to the MCCJ for the dismissal.[17] Ms. Rendell-Baker filed suit on July 28, 1977.

d. *The Discharge of Petitioners in* Klug.

The discharge of petitioners in *Klug* took place after a series of disturbances that persisted at the school following the Rendell-Baker dismissal. According to the complaint, the discharges occurred after "considerable discord among the administration, faculty and students at the School." J.A., ¶20. Given the instability of a student body with serious learning and behavioral problems, petitioners themselves agreed that the school's ability to provide services had been harmed if not destroyed by the failure of staff cohesiveness:

> "The School's ability to provide services has been seriously hindered and, in some cases, halted altogether. All the staff agree that the students are not being served.
>
> The staff also agrees that its own fragmentation has been a source of these problems."[18]

In response to this fragmentation, manifested by the plaintiffs' complaints and actions as outlined in their complaint, the School's Director held numerous meetings with faculty and students to discuss the reasons for the unrest and to seek suggestions for calming the School. But petitioners' grievances focused exclusively on the personal and professional integrity of the Director, with her inadequacies as the purported cause of the staff fragmentation. Their complaints were not at all related to constraints placed on petitioners' or other staff members' methods, means or manner of teaching *per se*. Disgruntled because the Director did not embrace their suggestions for change, particularly their call for her resignation, petitioners carried their grievances beyond the staff level, to the school's Board of Directors, the student body and the town newspaper. They prepared an affidavit of their complaints which

[17] The MCCJ premised approval for hiring a replacement on a satisfactory explanation for the dismissal. *Rendell-Baker* Record, 104, 115.

[18] Exhibit A, *Klug* Complaint, J.A. 30-31. See also Exhibit D, J.A. 64-66.

was made public and available to students. The affidavit, purportedly supported by detailed anecdotal material related to the school's operation, constituted a massive personal attack on the Director's personality, managerial skills and integrity.[19] The categories of the affidavit alone are demonstrative: "the director's inability to administer the program," "the director's undermining of staff effectiveness," "the director's inappropriate behavior toward, and inconsistent discipline of, students", "the director's insensitivity to issues of race", "the director's inappropriate, disrespectful, and unprofessional conduct" and "the director's precipitation of a school-wide crisis."

In response to their public demand for the Director's resignation, the Board of Directors gave the Director a vote of confidence. Public discussion, student picketing and disruption of the school program continued. At the close of the school year, petitioners were discharged for insubordination and disruption of the school program.[20]

After efforts to implement the school's grievance procedure failed due to petitioners' objections to the grievance panels' membership, petitioners brought suit in December, 1978.

Summary of Argument

The only issue before the Court is whether the respondent School may "be fairly treated ... as the State itself" when it discharged petitioner-employees. *Jackson* v. *Metropolitan Edison Co.*, *supra* at 351. Since the Fourteenth Amendment applies only "against state laws and acts done under State authority" (*The Civil Rights Cases*, 109 U.S. 3, 13 (1883)), it is this state action requirement that triggers the Amendment's restraints upon state power. Conversely, its absence stands as a protection from federal encroachment of individual and institutional autonomy. Unless respondents actions are held to be the actions of the state, their right to privacy, free association and institutional independence must remain free from the Amendment's reach.

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[19] The affidavit is attached to the *Klug* complaint as Exhibit B (J.A. 32-62).

[20] J.A. 26 (Complaint, ¶35).

Petitioners rest their Fourteenth Amendment claim on a kind of public function theory. The decision of the First Circuit is not challenged on any other grounds. Thus, petitioners concede that the state action requirement fails under the "nexus" test of *Jackson* or the "intertwinement" analysis of *Burton*.

The public function doctrine has been carefully confined to a narrow range of circumstances not present here. In order to attribute the acts of a private, independent school like respondents to the state under this doctrine, the state must have delegated to the school a function "traditionally exclusively reserved to the State." *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978); *Jackson*, *supra* at 351. In the first place, however, there has been no delegation by the state of such a function. To the limited extent of its application, the doctrine contemplates circumstances where the state has abdicated responsibility for a function or service it has always performed. Here, the reverse occurred. Passage of Chapter 766 constituted both an enhancement of public educational services and an outreach to private institutions through purchase of services contracts to assist those for whom public educational services might be inadequate or inappropriate. Moreover, regardless of how respondents came to provide it, special education is not now or ever has been a function exclusively reserved to the state. The provision of special education has been confined, until quite recently, to the private sector. The State's enhancement of its role did not render it the exclusive provider. The facts just do not bear this out. Moreover, beneficiaries have both private and public alternatives. Many special needs students and their families choose not to take advantage of the program, opting instead for a private setting of their own without any state involvement. For those who do take advantage of the program, there are built-in legal remedies to provide mechanisms for parents and their children to resolve disputes over an appropriate placement to fill their needs. In addition, alternatives are always available in the sense that these students may either remain in the public system or opt out of the public funding program altogether and seek a privately funded alternative.

Here, petitioners are not even beneficiaries of the function provided. Since the function does not serve them, their status precludes them from claiming that the school acted as to them. But even were the "function" defined this broadly, no conceivable "exclusivity" argument could be made as to petitioners since neither the state nor respondent monopolizes the special education employment market. On the contrary, for reasons perhaps having to do with the very flexibility and freedom from bureaucratic restraint that a private school affords, petitioners freely chose to teach at the school. Their discharge renders them no less free to seek employment in an open market than they were before their employment at the school.

Whether cast in the light of their argument that Massachusetts has legislated an inherently public function or in the context of their modified view of the Court's narrow public function definition, all of petitioners' claims have the inexorable effect of removing or eliminating the state action requirement. Their argument that the school performs an inherently public function ignores the strict definitional framework the Court has fashioned for the doctrine's application. The assertion is an example of the "pervasive potentialities" of a doctrine that, by its very terms, is "vague and amorphous" and admits of no limitation. *Evans* v. *Newton*, 382 U.S. 296, 322 (Harlan, J., dissenting). Their alternative claims that the public funding of special education renders it a state monopoly because a child is unable to obtain his/her rightful education without either state assistance or private money is tautological. It makes every publicly funded program a state "monopoly" by definition. By ignoring the private alternatives, it assumes they do not exist. Thus, it eliminates "exclusivity" as an essential element of the doctrine and removes any meaningful guidelines for the doctrine's application. Finally, by claiming that the constitutional interests at stake must be balanced in considering state action, regardless of the inadequacy of traditional indicia of state action, petitioners do away with state action altogether. But state action is not one of a number of ingredients in a formula. It is a threshold inquiry. The Fourteenth Amendment requires its

presence. It is either there or it is not. It cannot be satisfied by reference to the merits of the constitutional claims, assuming it *is* there. Without state action, there are no constitutional claims to consider.

After an exhaustive and meticulous analysis, the First Circuit found that the traditional state action tests had not been met. Petitioners novel approaches do not undermine the soundness of the lower court's judgment and should not be adopted. Since the state action requirement has not been met, the constraints of the Fourteenth Amendment cannot be considered in this context and the school should remain free to render independent judgments regarding its own program, including judgments regarding its personnel.

Argument

I. The Public Function Doctrine Of State Action Does Not Transform This Private School Into A State Actor.

As this Court has repeatedly maintained since *The Civil Rights Cases*, 109 U.S. 3 (1983), federal enforcement of the prohibitions of the Fourteenth Amendment[21] are strictly limited to those acts or laws committed "under State authority". 109 U.S. at 13. The reach of the Fourteenth Amendment is unquestionably not to render all "relations between individuals a matter of federal concern"[22] but rather to constrain the state and the state alone from infringement of the cherished civil rights that the Fourteenth Amendment protects. The state action requirement then arises out of the fundamental nature of the Fourteenth Amendment: it is state-sanctioned wrongdoing, not the private acts of private individuals that is prohibited. In the words of the Court,

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[21] At issue there, as here, was the "state action" requirement of the Fourteenth Amendment. Section of the Fourteenth Amendment provides, in pertinent part,

> "No state shall ... deprive any person of life, liberty, or property, without due process of law ..."

[22] *Henkin, "Shelley* v. *Kraemer:* Notes for a Revised Opinion," 110 U. Pa. L. Rev. 473, 475 (1962).

> "Civil rights, such as are guaranteed by the Constitution against State agression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual . . . but if not sanctioned in some way by the State . . . [the victim's] rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress . . . Hence, in all the cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied." *Civil Rights Cases*, 109 U.S. 3, 17-18 (1883).

In recent years, the Court has reaffirmed this fundamental principal by focusing on the connection between the specific act complained of and state responsibility for it. This is the familiar edict of *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) that there must be "a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the state itself". *Id.* at 351. See also, *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). Only a few cases have focused on the more abstract institutional relationship between the private entity and the state without regard to the specific act complained of. In these cases, the Court has recognized two distinct approaches. The first, articulated in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) and recognized but distinguished in *Jackson* was the "intertwinement" or "symbiotic relationship" test whereby extensive regulation and performance of a public service might show such a "symbiotic

relationship"[23] between the private entity and the state that "the state will be held responsible for conduct with which it had no direct connection."[24] The second so-called public function doctrine is an inverted version of the same approach, namely that the state has delegated to a private entity a function so closely associated with the state, so "traditionally exclusively reserved to the State",[25] that the private entity must be said to *be* the state and therefore assume its constitutional obligations.

Petitioners do not contest the lower court's ruling and analysis on either *Jackson's* "nexus" approach or *Burton's* "intertwinement" approach. Indeed, it must be taken as conceded, as the First Circuit concluded after an exhaustive and meticulous examination of respondent's particular institutional characteristics, its level of state funding and regulation and the nature of the services provided, that there was neither a sufficient showing of state involvement in the dismissal nor the kind of institutional "intertwinement" necessary to meet the *Burton* test.

> "... [T]hese factors, altogether as well as separately, do not demonstrate that the state has so dominated the school as to make all the school's actions, and particularly those related to personnel, attributable to the state. The school's management by a private Board of Directors on which the state is not represented, and the broad range of independent discretion which these directors appear to exercise particularly in personnel matters, belie the notion of state domination." *Rendell-Baker*, Id. at 27.

In conceding the lower court's analysis and conclusion, petitioners become wholly reliant upon an expansive verson of the "public function" approach.[26] They claim that the state has delegated such an inherently "public function" to respondents that respondents

[23] *Moose Lodge*, 407 U.S. at 175; *Jackson*, *Id.* at 357.

[24] *Downs* v. *Sawtelle*, 574 F.2d 1, 8-9 (1978).

[25] *Jackson*, 419 U.S. at 352.

[26] In this they have apparently conceded the threshold requirement of state action under all traditional tests the Court has enunciated.

must be held to the same constitutional obligations as the state in carrying out that function, including the appropriate procedural prerequisites before discharge of employees.[27]

The Court has already characterized the cases in which the public function doctrine has been applied as a "limited line of cases" eliciting criteria "not susceptible of definition and form[ing] an unsatisfactory test."[28] In the context of claims by beneficiaries of a quasi-monopolistic private utility service to pre-shut-down due process hearings, the Court expressly rejected any expansion of the doctrine "into a broad principle that all business 'affected with the public interest' are state actors in all their actions." *Jackson*, 419 U.S. at 353. Here, where the claimants are not the beneficiaries of the service in question but employees asserting due process enhancements to their employment by a non-monopolistic private school, the Court should again reject any expansion of the doctrine.

A. *No Public Function Has Been Delegated to Respondents Within the Meaning of the Doctrine.*

The public function doctrine, to the limited extent of its application, has been restricted to a few select activities under unusual circumstances. Indeed, its unambiguous application has only occurred when the private entity assumed all the characteristics of a municipality or performed a function which has the effect of wholly controlling the political process and thereby taken on a similar assumption of power. *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Terry* v. *Adams*, 345 U.S. 461 (1953). In *Marsh*, every aspect of the "municipal" functioning of Chickasaw, Alabama — provision of utilities, sewage, mainten-

[27] Petitioners also assert that even if not inherently a public function, they meet the Court's "traditional" and "exclusive" tests. But as will be demonstrated, this argument is but a reiteration of their inherent public function approach. See *I.B.* below.

[28] *Jackson*, 419 U.S. at 353, citing with approval the language of *Nebbia* v. *New York*, 291 U.S. 502, 536 (1934).

ance of roads and other "common areas" etc. — was owned and operated by Gulf Shipbuilding Corporation. There, with emphasis on the company's treatment of the streets as "public" in the sense that it had not otherwise restricted access to them, the Court found state action in the company town's restrictions against distribution of religious literature. *Nixon*, *Smith* and *Terry* (the election cases) all involved delegation to a private organization of the conduct of local elections whose practical effect was the election of all local officials. In *Nixon* and *Smith*, the delegation of this authority was made after holdings that the manner in which the state had previously conducted such elections was impermissible.

Since *Terry*, the Court has applied the doctrine in only one other regard, but that holding was thereafter discredited and then expressly overruled. In *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), state action was found in the operation of a private shopping center when the activity (labor picketing) was related to the purpose for which there was public access. Four years later, the Court's ruling in *Lloyd Corporation* v. *Tanner*[29] implicitly overruled *Logan Valley*. This was followed by an express overruling in *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976). *Hudgens* affirmed that the doctrine had little application except in unusual circumstances such as *Marsh's* streets of a company town and *Smith's* party nominating procedures. The Court adopted Justice Black's long-held view that the public function doctrine applied only to where the entity "took on all the attributes of a town" and apparently to nothing else. *Marsh*, 326 U.S. at 502.

Marsh and the election cases have a common thread essential to both holdings: the state had wholly relinquished its responsibility by the simple expedient of either withdrawing from the scene or in

[29] 407 U.S. 551 (1972). *Lloyd* rejected the doctrine's application to satisfy state action where there was an anti-war demonstration at a private shopping center. It was apparently because there was room to distinguish the labor picketing in *Logan Valley* from the anti-war demonstration in *Lloyd* on the grounds that the former was related to the purpose for which the shopping center was open to the public while the latter was not that *Hudgens* expressly disposed of *Logan Valley*. See *Hudgens*, 424 U.S. particularly at 518 et. seq.

the unusual circumstances of *Marsh*, never having been there in the first place. These cases are on one extreme of the broad spectrum of state action cases the Court has confronted: where the State, either by a totally passive inaction or an affirmative abdication of responsibility permits all of the fundamental power obligations common to a municipality to fall into private hands, it cannot be allowed to thereby avoid the strictures of the Fourteenth Amendment.[30]

In this critical sense, these circumstances are far different from those where the doctrine has been applied. Whether in the sense of absence (*Marsh*) or affirmative abdication, the state has not made a "delegation" to respondents in the manner that the doctrine requires. Indeed, the very nature of the statutory scheme compels a contrary conclusion. Rather than a "delegation" of an on-going state obligation to the private sector, the statute, as applied to private providers like respondents, represents a financial responsiblity and obligation the state need not have assumed. The major thrust of the law is to greatly expand the provision of special education by the public sector and to set forth procedures for their

[30] It is the lack of this total abdication which distinguishes this Court's decision in *Evans* v. *Newton*, 328 U.S. 296 (1966). There the state's abdication of control over a local park to a private trustee was not real but in the nature of a ruse to expressly defy Fourteenth Amendment requirements. In its opinion the Court emphasized that for decades prior to institution of the suit, the city had totally maintained the "whites only" park as a public facility, and found that, even though just prior to suit, private parties had replaced the City as trustee of that park, the City still exercised total control over and maintenance of the park. Indeed, the Court has stated that: "We think *Newton* rests on a finding of ordinary state action under extraordinary circumstances. The Court's opinion [in *Newton*] emphasizes that the record showed 'no change in the municipal maintenance and concern over this facility', after the transfer of title to private trustees. That transfer had not been shown to have eliminated the actual involvement of the City in the daily maintenance and care of the park". *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 159, fn.8 (1978). The lesson of *Newton*, as the lower court stated, is that "should a public institution be placed in private hands with the actual purpose of evading constitutional requirements, the courts may look beyond the formal structure of the institution to find other indicia of state involvement." *Rendell-Baker*, 641 F.2d at 23. Of course, this approach is not relevant for consideration here.

appropriate delivery. M.G.L. c. 71B, § 1 et. seq. It is in that context that the legislature recognized the reality that localities had limited capabilities to assume this responsibility and often had neither the capability nor the public facilities for it. It is for this reason that the legislature provided a mechanism for contracting for services with private schools such as respondents.[31] The legislative goal was not to withdraw from a service it had provided or circumvent its obligation by placing a private actor in its stead. Rather, its goal was to ensure quality special education regardless of public availability through the mechanism of purchase of service contracts.

It was in part because of the Court's view that the public function doctrine contemplated an abdication of an on-going state responsibility to a private entity that the Court rejected its application in both *Jackson* and the more recent *Flagg Bros.* v. *Brooks*, 436 U.S. 149 (1978). For example, *Jackson* suggests the doctrine might be applicable were the state to abdicate its eminent domain function. *Jackson*, 419 U.S. at 353. The court's commentary related not merely to the nature of the function but to the sense of relinquishment. It was in this regard that the Court reserved judgment in *Flagg Bros.*, "as to the extent, if any, to which a city or state might be free to delegate to private parties the performance of such functions [as education, police and fire protection and tax collection] and thereby avoid the strictures of the Fourteenth Amendment."[32] Nothing in *Flagg Bros.* intimates the Court's

[31] M.G.L. c. 71B, § 4 provides in pertinent part:

> "The school committee of any city, town or school district may, to meet its obligations under section three, with the approval of the department enter into an agreement with any other school committee to jointly provide special education or, subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, may enter into an agreement with any public or private school, agency or institution to provide the necessary special education within the city, town or school district."

[32] *Flagg Bros., Id.* at 163-164. Petitioners rely upon this quotation to suggest that the question of application of the public function doctrine to these circumstances was left open in *Flagg Bros.* But the Court's emphasis was clearly on the aspect of "active" delegation by the state, not the nature of the function.

interest in subjecting to constitutional scrutiny state enacted purchase of service relationships with private entities merely because the private entity might be involved in one of the named functions. If anything, the Court has consistently maintained the view that state enhancement of its services through purchase of services outreach to the private sector should not, in the absence of direct control, constitute a basis for state action.[33] For purposes of what *Flagg Bros.* had in mind, this case would be analytically distinct had Brookline terminated its direct provision of all educational services and contracted out the provision of secondary education to private schools. Since the reverse is true — Brookline has been compelled to expand its services into the special education field, but has been permitted to do so in part by contracting with private schools to accomplish its task — this case does not fall within the contemplation of the doctrine at all.

B. *Special Education is not a Function Traditionally and Exclusively Reserved to the State.*

It is no accident that this Court has imposed a strict definitional framework to the public function doctrine and has kept it within "carefully confined bounds." *Flagg Bros.*, 436 U.S. at 164. Both the range of government activities which could be called "public" as performed in private hands and the imprecision of the term itself render the doctrine a "slender analytical reed upon which to lean, for it admits of practically no limitation"[34] and thus an "unsatisfactory test:"[35]

> "It substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and

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[33] *Rendell-Baker, supra* at 25; *Jackson, supra;* Cf. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) and *Polk County* v. *Dodson*, 50 U.S.L.W. 4077 (December 14, 1981).

[34] *Milner* v. *National School of Health Technology*, 409 F. Supp. 1389, 1393 (E.D. Pa. 1976), citing *Isaacs* v. *Board of Trustees of Temple University*, 385 F. Supp. 473 (E.D. Pa. 1974).

[35] *Jackson*, 419 U.S. at 353, citing with approval *Nebbia* v. *New York*, 291 U.S. 502, 536 (1934) which rejected a substantive due process claim on the basis of the vagaries of terms such as "affected with a public interest" and "clothed with a public use."

> amorphous as it is far-reaching. It dispenses with the sound and careful principles of past decisions in this realm. And it carries the seeds of transferring to federal authority vast areas of concern whose regulation has wisely been left by the Constitution to the States." *Evans* v. *Newton*, 382 U.S. at 322, Harlan, J., dissenting.

Thus, when the Court adopted a severely circumscribed definitional framework for its application it did so in contemplation that it would be rarely applied. It is axiomatic that much of institutional life, and a good deal of the human condition, is affected by state funding and/or regulation: "Mere receipt of financial subsidy and subjection to some regulation are the conditions of much of our societal life." *McQueen* v. *Drucker*, 438 F.2d 784, 791 (1st Cir. 1971).[36] Conversely, "[t]here are few institutionalized activities which touch the public welfare which the modern state would not, or even has not, taken over somewhere in the absence of private operation." *Pendrell* v. *Chatham College*, 370 F. Supp. 494, 497 (W.D. Pa. 1974). Only where "powers traditionally exclusively reserved to the state"[37] are delegated to a private entity may the doctrine be applied.[38] Since the function respondents per-

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[36] Quoted with approval in *Rendell-Baker*, *supra* at 25.

[37] *Jackson*, 419 U.S. at 351.

[38] Petitioners contention that this Court has not foreclosed the proposition that public education is an inherently "sovereign function for state action purposes" (Petitioners' Brief at p. 18) is without merit. First, this Court has never recognized any function inherently "sovereign" without reference to a definitional framework. Second, petitioners reliance on *Ambach* v. *Norwick*, 441 U.S. 68 (1979) is irrelevant because there was no issue there of state action. Finally, petitioners' assertion ignores the Court's long history of refusing to define as "public" or "sovereign" a private endeavor because the government also happens to engage in it. See *Jackson*, 419 U.S. at 353, fn.9. The public function doctrine is difficult enough to define. See *Jackson*, 419 U.S. at 353, citing with approval *Nebbia* v. *New York*, 291 U.S. 502, 536 (1936). To ignore the definitional requirements *Jackson* and *Flagg Bros.* impose would open the door to the unlimited possibilities for the reach of the doctrine that Mr. Justice Harlan so feared in his dissent in Newton. Indeed, by utterly failing to distinguish between public education and special needs education and claiming that the latter is encompassed by the former, petitioners embrace the very amorphous qualities of the doctrine the Court has striven to avoid.

form, quite apart from the process by which it devolved upon them (see Argument *I.A.* above), is neither a traditional or exclusive state function, this is not one of those rare cases for the doctrine's application.

Whether the purported government function is characterized as "public education" or "special needs education,"[39] there can hardly be dispute that the power is not one "traditionally associated with sovereignty."[40] The very passage of Chapter 766 in 1972 is evidence enough of that. Indeed, it was precisely because public schools had *not* traditionally educated special needs children that Chapter 766 was enacted: "[I]t is only recently that public school systems have assumed any responsibility for children with special needs; until a few years ago such children were routinely excluded from public schools." *Rendell-Baker*, 641 F.2d at 26.[41] Contrary to petitioners' contention, prior to 1974 education of special needs children in the public sector had been either non-existent or circumscribed in the extreme.[42] And whatever efforts were made by the state, they did not alter the historical reality that education

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[39] Petitioners characterize respondents' function as "public education" and proceed to assert its inherently "sovereign" characteristics and its "critical mission" in our social fabric. Petitioners' Brief at 19-20. But to emphasize its value does not render it "sovereign" any more than electricity was in *Jackson*. Moreover, this approach clouds the issue. It is the nature of the power that is at issue, not the nomenclature. Here the nature of the power is a specialized branch of education made publicly fundable in 1974. Unless a function can become "traditionally associated with sovereignty" merely by the sovereign declaring it so, respondents' function can hardly be described in this manner.

[40] *Jackson*, *supra* at 353. But see *Flagg Bros.* which expressly rejected the Second Circuit's view that "state action might be found in the exercise of 'some power delegated to it by the State which is traditionally associated with sovereignty.' " *Flagg Bros.*, *supra* at 155.

[41] Generally, such children were excluded from the compulsory education law. M.G.L. c. 76, § 1 (St. 1939, c. 461 as amended). But Chapter 766, (St. 1972, § 12) subjected this exclusion to § 3 of the new law (M.G.L. c. 71B, § 3).

[42] See, e.g. the earliest statutory endeavor, St. 1919, c. 277.

of special needs and handicapped children remained predominantly in private hands until the very recent past.[43] In any case, "[e]ven near complete government funding does not turn a private charitable and educational institution into a public entity so long as the private institution remains free, in fact, to control its own affairs." *Rendell-Baker*, 641 F.2d at 25. Finally, perhaps the best means of testing the requirement of "tradition" is to ask whether the service or function in question is so intimately related to our historic notions of "state-ness" that it would be supplied by the state but for the existence of the private counterpart. No reasonable view of the state's role could supply an affirmative answer. The need for and the importance of special education are beyond question. However, partial assumption of state fiscal responsibility of this service simply can not be viewed on the same level of importance as such essential functions as police, fire or eminent domain. This is not a service "of such public importance that the State invariably either provides the service itself or permits private companies to act as state surrogates in providing it." *Jackson*, 419 U.S. at 372 (Marshall, J., dissenting).

Perhaps more crucial is the failure to meet the requirement of exclusivity. As the Court stated in *Flagg Bros.*, "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State' ". *Flagg Bros.*, 436 U.S. at 158. In reviewing the two lines of cases where the public function was applied — the election cases on one hand and *Marsh* on the other — the Court saw the critical common element as "the feature of exclusivity". *Flagg Bros.*, 436 U.S. at 160. The Court went on to distinguish the dispute resolution function at issue in *Flagg Bros.* on that basis: unlike the political office seeker in *Terry* or the member of Jehovah's Witnesses who wished to distribute literature on the streets of the company town in *Marsh*, the creditor and debtor in *Flagg Bros.* had a wide range of choices in "resolving this purely private dispute." *Id.* at 160.

[43] For a detailed historical analysis, see Brief for Amicus Curiae, the Massachusetts Association of the 766 Approved Private Schools, Inc.

The lesson of *Flagg Bros.* is that the exclusivity requirement must be satisfied in two distinct ways. First, the private institution must wield a monopolistic government power. Second, it must wield that power in respect to the beneficiaries of the service it provides.[44] In neither sense that *Flagg Bros.* defines it is the exclusivity requirement satisfied here.

There is no support whatsoever for the assertion that respondents, or for that matter any other private special education school providing services under Chapter 766, wield monopolistic government power in the provision of educational services. In this regard, the role of respondents is no different from any privately run secondary school, whether servicing Chapter 766 children or not. As to *all* children, Massachusetts has taken upon itself the responsibility of providing a sufficient number of public schools. These children and their families are not only assured but required to obtain an education. See M.G.L. C. 76, § 1. The State has also taken upon itself the responsibility of providing a publicly supported education for students with special needs. Compare 71 M.G.L., § 1 with 71B M.G.L., §§ 2, 3. But neither obligation creates the expectation or the requirement that the state assume exclusive monopolistic authority.[45] As *Jackson* stated in rejecting the Court's application of the public function doctrine to public education:

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[44] More accurately, the power must be wielded against those who are would-be beneficiaries but have been excluded from it. See *Choper*, "Thoughts on State Action: The 'Government Function' and 'Power Theory' Approaches", 1979 Washington University Law Quarterly 757.

[45] Petitioners argue that statutory creation of a right to special education creates an expectation and entitlement to such a State supported service, with attendant constitutional obligations which cannot be delegated and are just as worthy of recognition and fulfillment as traditional and exclusive public functions. Petitioners' Brief, p.18 et. seq. In this manner they assert that Massachusetts may establish special needs education as a "legislatively-declared sovereign function." Brief at 21. But state action is a threshold inquiry engaged in and determined by the federal judiciary and penultimately this Court, not the Massachusetts legislature. Thus, their assertion ignores the reality that it is this Court's tradition and exclusivity tests that must be met. Moreover, even if considered, the argument ignores two fundamentals of federalism. First, the Supremacy Clause would

> . . . "It is difficult to imagine a regulated activity more essential or more 'clothed with the public interest' than the maintenance of schools, yet we stated in *Evans* v. *Newton*, 382 U.S. 296, 300, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966):
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> > 'The range of government activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems.' " *Jackson*, 419 U.S. at 353, fn.9.

In this same vein, it goes without saying that children in the Commonwealth may and do attend private or parochial schools to fulfill their statutory obligation.[46] So too may children with special needs — at their own expense and not within the statutory framework of Chapter 766. Moreover, if they do seek a publicly funded program, a special needs educational plan devised for a child is "subject to the consent of the parent or guardian affected thereby" M.G.L. Ch. 71B, § 4. If a child's parents do not agree with the educational plan devised by the state, they are free to provide their child, at their own expense, with an alternative educational program. Alternatively, they may decide to keep their child in a regular public school setting or to opt for a public school

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wholly negate such a claim. Second, when the State creates an entitlement, it is the State which has the right to define the expectations surrounding that entitlement. Thus, great deference must be given to Massachusetts' failure to afford teachers in private special education programs any of the procedural rights afforded all public school teachers. *Bishop* v. *Wood*, 426 U.S. 341 (1976); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) See M.G.L. c. 71, § 41 *et. seq.*

[46] Education "has never been a state monopoly in this country, even at the primary and secondary levels." *Powe* v. *Miles*, 407 F.2d 73, 79 (2d Cir. 1968); *Jackson*, 419 U.S. at 353, fn.9.

special needs program not recommended by the school committee.[47] The existence and vitality of these alternatives is the best proof that the function is not monopolistically held. It is just such freedom of choice that the state action concept implicitly preserves and which compels a close confinement of the public function doctrine. Petitioners' claim that these circumstances compel the student to choose between a suitable education and a public education and that only with respondents can a suitable and "public" education be obtained is no more than an assertion that the state has a monopoly on publicly funded programs.[48] By defining "monopoly" as a monopoly in the public sphere, petitioners ignore the obvious private alternatives and ask the Court to adopt a meaningless redundancy as a basis for the doctrine's application. It is comparable to asserting in *Flagg Bros.'* context that because the state had established a "public right" to resolve disputes, the debtor's inability or failure to exercise this right without regard to the private alternatives demonstrated a state monopoly on the function. Were there *any* other means of distributing religious literature in the streets of Chippewa, Alabama or *any* other avenue for gaining office in Fort Bend County, Texas, the results in *Marsh* and *Terry* surely would have been different. But, just as the debtor in *Flagg Bros.* could have exercised the purely private remedy of "seeking a waiver of *Flagg Brothers'* right to sell her goods at the time she authorized their storage,"[49] the students at respondents' School had alternative means for obtaining special needs education in the Commonwealth.[50] Moreover, *Flagg Bros.*

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[47] M.G.L. c. 71B, § 3; *Amherst-Pelham Regional School Comm.* v. *Department of Education*, 376 Mass. 480, 381 N.E.2d 922 (1978).

[48] Petitioners' Brief, p. 24-25.

[49] *Flagg Bros.*, *supra* at 161.

[50] While respondents population is comprised of all publicly funded students, the population of other such schools is more evenly divided between children referred and paid for by the state and children referred by and paid for by their parents or guardians or those on privately endowed scholarships. See Brief of Amicus Curiae.

clearly establishes that where state-based legal remedies are available, the exclusivity requirement is not satisfied. The debtors in *Flagg Bros.* not only had their self-help "private" option of requiring a waiver. The Court also recognized their legal remedy, after the taking, of an action in replevin. Even these legal remedies were foreclosed in *Marsh*, *Terry*, *et al.* But under Chapter 766, the students and their families have built in legal remedies regarding any conflict over an appropriate placement for their special education. M.G.L. c. 71B, § 4, 10. Thus, the respondent school, far from being monopolistic, is but one of many options for the class of individuals it serves. Armed with numerous substantive alternatives as well as built-in legal remedies, these special needs children can hardly be deemed a captive audience.

But petitioners are not even the beneficiaries of the service provided. Thus, the second aspect of *Flagg Bros.*' exclusivity requirement fails here as well. That is, the purported monopolistic function has not been exercised directly in respect to the purported beneficiaries of the service being provided.[51] It is only in regard to specific aspects of its activities, namely those that are involved in the exercise of its monopolistic government-like powers, that the private entity may be exposed to the public function doctrine. For example, the holding in *Marsh* would not bar Gulf Shipbuilding Corporation from firing a factory worker without notice and a hearing. If the claim in *Jackson* were made by a black applicant for a clerical job at Metropolitan Edison Company, he could not claim Fourteenth Amendment state action in that discriminatory policy.[52] A finding here that a private school's dismissal of its teachers constitutes state action would represent a significant

[51] This was not an express holding in *Flagg Bros.* but implicit in the Court's discussion of the meaning and importance of the exclusivity requirement. *Id.* at 160.

[52] See *Choper*, Id. at 781. Obviously, these hypotheticals serve to highlight state action analysis only. The factory worker might have some recourse or remedy at state law. The black applicant would have an independent federal cause of action under Title VII of the Civil Rights Act of 1964 as well as his state remedies, if any.

extension of the public function doctrine into the "collateral aspects of that function". *United States* v. *Wiseman*, 445 F.2d 792, 796 (2d Cir. 1970), *cert. denied*, 404 U.S. 967 (1971). As applied here, the challenged exercise of power — dismissing teachers — must be directly related to the exercise of the exclusive power respondents wield. But respondents not only were not acting with exclusive force, they were not acting in respect to the beneficiaries of the program, i.e., the students:

> "The 'public function' concept is strongest, moreover, when asserted by those for whose benefit the state has undertaken to perform a service, or when the state has lent its coercive powers to a private party. In this situation, for example, those students of the New Perspectives School who were placed there by their local school committee, particularly those who are compelled to attend under the state's compulsory education laws, would have a stronger argument than do plaintiffs that the school's action *towards them* is taken 'under color of' state law, since the school derives its authority over them from the state." *Rendell-Baker*, *supra* at 26. (emphasis in text).

This simple distinction highlights the fragility of petitioners' position. Petitioners were under no compulsion to teach at the school. The school hasn't the remotest degree of market exclusionary force on special needs teaching positions.[53] Access to employment through a free market was and is still available to petitioners. They choose to teach special needs children in a private school rather than a public school setting:

> "Plaintiffs in this suit, however, are not the intended beneficiaries of the service for which the state has contracted

[53] A major function of the Fourteenth Amendment's state action provision is 'to regulate the exercise of centralized power — the kind of power that might be consciously employed to foreclose individual competition in a free market' ". *Choper*, *Id.* at 766, quoting Winter, Changing Concepts of Equality: From Equality Before the Law to the Welfare State, 1979 Wash. U.L.Q. 741, 744.

> with the school. The school's authority over its faculty derives from the contractual relationship of employment, not from 'state law'. The school does not perform any public function toward them . . .". *Rendell-Baker, supra* at 26.

Thus, for public function doctrine purposes, teachers are quite distinct from the beneficiaries of the function they provide.[54] The respondents cannot and did not take action toward petitioners with state-vested authority. Petitioners' status was that of private employees with rights, if any, arising under state law.[55]

Respondents, like other private and parochial schools are an important part of the educational system in the Commonwealth. In a real sense, these private schools aid the state in discharging its statutory responsibility to provide compulsory education to all children. But in aiding the state in performing an important function they do not thereby become state actors. The only distinctive characteristic of respondents is that its students are special needs children whose education is largely publicly funded. By petitioners' thesis, any school that accepts public funding for even one such student would necessarily be transformed into a state actor.

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[54] This is altogether different of course from those cases which affirm the important role of teachers in our public educational systems and the protection that must be afforded their constitutional rights, particularly where First Amendment free speech is implicated. See *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967). But these issues were confronted in the context of unquestioned state action. Unless and until state action renders that Amendment applicable, it cannot be addressed by the federal courts. See Argument II below.

[55] In this regard, they may have contractual rights under rulings which hold that a discretionary employee has a right not to be dismissed in bad faith. See *Fortune* v. *National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977). Moreover, petitioners in *Klug* have already exercised their right to petition the Massachusetts Labor Relations Commission under M.G.L. c. 150A, § 2 and 4(3). See respondents' Motion to Dismiss or Stay Proceedings, J.A. 80-81. These provisions provide for administrative agency review for claims of employer discrimination, including discharge, where such acts were purportedly designed to discourage union organizing or membership.

But

> "... a school for the deaf or the blind, managed by an all-private board, does not surrender its rights to pursue independent policies merely because the students are on state-funded scholarships. Even near complete government funding does not turn a private charitable and educational institution into a public entity so long as the private institution remains free, in fact, to control its own affairs". *Rendell-Baker, Id.* at 25.

To adopt the criteria of public-funding as the sole requirement of state action would render the state action concept meaningless and expose every state-funded service — even the private school with but one special needs child[56] — to judicial scrutiny and congressional regulation. The "pervasive potentialities" of the doctrine Mr. Justice Harlan found so fearfully "vague and amorphous" would be realized.[57] Every time the state funded a service in private hands, the private actor would be transformed into a state actor and the doctrine would instantly "reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental through paralleling fields of governmental activity ... whose regulation has wisely been left by the Constitution to the States."[58]

To draw a line of public function application so as to include New Perspectives School and exclude other traditional private and parochial schools, including other private special needs schools, has no rational basis. Creation of a publicly supported education for students with special needs did not transform the private provider into a state actor any more than creation of a public school system transformed the traditional private or parochial school into a state actor.

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[56] The Massachusetts Department of Education guidelines by which the School is in part regulated "apply to any school at which a locality seeks to place even a single child under Chapter 766; the Department appears to contemplate placement of some children in schools whose other students are all privately funded". *Rendell-Baker, Id.* at 25.

[57] *Evans* v. *Newton*, 382 U.S. at 321-2 (Harlan, J., dissenting).

[58] *Evans* v. *Newton*, 382 U.S. at 321-2 (Harlan, J., dissenting).

II. In The Absence Of State Action, There Are No Constitutional Rights Infringed. Therefore, No "Appropriate Balancing" Of Constitutional Rights Can Occur.

Petitioners take the novel view, never seriously considered by the Court before, that state action is not, as the Fourteenth Amendment would have us suppose, a threshold prerequisite to federal judicial scrutiny of respondents' acts. Rather, they assert that where there are "substantial indicia of state action",[59] though inadequate to meet *any* of the Court's enunciated tests, it is appropriate, before a state action claim is foreclosed, to identify and weigh "the competing constitutional interests at stake".[60] Having enunciated their own rule of constitutional analysis, petitioners proceed to "identify" the "competing constitutional interests" and "weigh" them with predictable results.

Petitioners argument rests on the thesis that state action is not an issue at all since "whenever, and however, a state gives legal consequence to transactions between private persons, there is state action."[61] Since there is some state action in virtually every transaction between individuals, a review of the competing interests at stake would necessarily occur. Thus regardless of the actual degree of state action, the substantive claims would be considered as part of the jurisdictional determination.

What is wrong with this analysis is that it ignores the central feature of the Fourteenth Amendment. In the absence of state action, there are *no* constitutional rights being infringed. State

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[59] Petitioners' Brief, p. 26, Argument B.1. and B.2., see especially B.2. at p.34, et. seq.

[60] Petitioners' Brief, p. 35.

[61] Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, S. Cal. L. Rev. 208, 209 (1957). In a variety of modified guises, this is the theme of those commentators cited by petitioners in their Brief at footnote 31. For example, Glennon and Nowak urge state action whenever a private individual's conduct "is lawful within the state" "whether the state has explicitly authorized the challenged practice or simply allowed it to exist." *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup. Ct. Rev. 221, 230. But see *Choper*, Id. at 757 and especially 761 *et seq.*

action defines the point at which constitutional rights may be implicated in certain rules or conduct. State action either exists, in which case constitutional rights are implicated, or it does not exist, in which case they are not. It is not a test whose inadequacy can be overcome by reference to the importance of the substantive claims the very existence of which depend upon the threshold finding of state action. In short, without it, petitioners have no constitutional claims. Unless the threshold inquiry can be met, respondents' private acts, even if wrongful, are "simply a private wrong"[62] and cannot impair petitioners' constitutional rights.[63] Petitioners' theory,

> "... [b]y effectively obliterating the distinction between state action and private action ... eviscerate[s] the fourteenth amendment's restriction on the authority of the national government vis-a-vis the state regarding the regulation of the myriad relationships that occur between one individual and another. These approaches require that all private activity, except that small amount which is beyond all governmental control, conform to federal constitutional standards.
>
> Thus, at the intitiative of any litigant who is offended by another person's behavior, these theories would subject to the scrutiny of federal judges, under substantive constitutional standards customarily developed for measuring the actions of government, all sorts of private conduct that because of political constraints and collective good sense would probably never be mandated by law. Further, by permitting private actors to violate constitutional norms when they have a constitutionally protected liberty interest to do so, these theories would delegate to federal judges the power to implement the vague mandate of the due process clause in speaking the final word about the validity of virtually all transactions

[62] *The Civil Rights Cases*, 109 U.S. at 17.

[63] See e.g. Nolte, *State Action After Jackson* v. *Metropolitan Edison Co.: Analytical Framework for a Restrictive Doctrine*, 81 Dickson Law Review 315 (1977).

> between individuals. In doing so, the national judiciary would be required to determine whether private conduct was constitutionally immune from governmental control even though, because of general political sensitivity to individual autonomy, such private conduct probably would never be regulated by the state".[64]

Implicit in this fundamental objection is a more practical one. By permitting consideration of the substantive claims in their assessment of state action, the federal district courts would be compelled to hold a kind of "preliminary trial" before making the jurisdictional determination. Then, having identified, evaluated and weighed the substantive claims in a state action context, the process would be repeated in a more elaborate trial on the merits. Needless to say, the impact on the expeditious handling of § 1983 claims where a Fourteenth Amendment state action issue had been raised would be substantial.

In the absence of an adequate basis for state action, an absence petitioners apparently concede in their "balancing" argument, it is *respondents* constitutional right to free association, privacy and institutional autonomy that is at stake here.[65] If there is a balancing to be done, it is their rights which must be weighed against the purely private claim of petitioners to continuing employment. In petitioners' own words, "[t]he school's ability to provide services has been seriously hindered and in some cases halted altogether . . . All the staff agrees the students are not being served. The staff also agrees that its own fragmentation has been a source of these problems."[66] Respondents are a school for special needs students

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[64] *Choper*, Id. at 762. As *Choper* points out this approach to state action would also "empower federal legislators with vast authority under Section Five of the Fourteenth Amendment to establish a body of statutory rules governing many aspects of private affairs". *Id.* at 762.

[65] See *The Civil Rights Cases*, 109 U.S. (1883); *Olmstead* v. *United States*, 277 U.S. 438 (1928); *Roe* v. *Wade*, 410 U.S. 113 (1973).

[66] Exhibit A to *Klug* Complaint, J.A. 30-31. See also Paragraph 20 of the *Klug* Complaint, where petitioners concede that "[f]or at least the past one and a half years there has been considerable discord among the administration, faculty and students at the School . . ." J.A. 23.

unable to be serviced in a public school. The students are high school aged with a history of emotional problems and drug and alcohol abuse. Given the population the school accepted and the particular administrative problems petitioners concede had hindered or halted the school's entire educational program, respondents were and ought to be free to follow independent policies of their own choosing with regard to all internal matters. Viewed in this light, the school's associational and privacy rights in personnel matters, or indeed regarding any other matter related to the day-to-day administration of such an institution, cannot be overcome by petitioners' purported constitutional "interest" in attacking the personal and professional integrity of the respondents' Director and publicly calling for her resignation[67] free of jeopardy to their employment.

In summary, if petitioners are private teachers in a private school they have no constitutional right to due process or free speech which the school can infringe. It is only where respondents "action may fairly be said to be that of the state"[68] that these rights may be implicated. In the absence of state action, it would be wholly inappropriate and unprecedented to engage in a balancing process, since the nature of the rights and interests involved can only be assessed after a finding of state action. In short, it is not petitioners' due process and free speech claims that are before the court but their right to bring such claims before a lower court that is at issue. Unless and until such a right is recognized, no constitutional rights are implicated and no "balancing" can occur.

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[66] Exhibit A to *Klug* Complaint, J.A. 30-31. See also Paragraph 20 of the *Klug* Compalint, where petitioners concede that "[f]or at least the past one and a half years there has been considerable discord among the administration, faculty and students at the School . . ." J.A. 23.

[67] Joint Appendix, p.32 et seq., Exhibit B to *Klug* Complaint.

[68] *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1947).

Conclusion

For all of the above reasons, the judgment of the Court of Appeals in both *Rendell-Baker* and *Klug* should be affirmed and the cases dismissed.

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APPENDIX A

Constitutional, Statutory, and Regulatory Provisions

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Massachusetts General Laws, Chapter 71B, Section 1:

The following words as used in this chapter shall, unless the context requires otherwise, have the following meanings: "Department", the department of education; "School age child", any person of ages three through twenty-one who has not attained a high school diploma or its equivalent; "School age child with special needs", a school age child who, because of temporary or more permanent adjustment difficulties or attributes arising from intellectual, sensory, emotional, or physical factors, cerebral dysfunctions, perceptual factors, or other specific learning disabilities or any combination thereof, is unable to progress effectively in a regular school program and requires special classes, instruction periods, or other special education services in order to successfully develop his individual educational potential; "Regular education", the school program and pupil assignment which normally leads to college preparatory or technical education or to a career; "Special education", educational programs and assignments, namely special classes, programs or services designed to

develop the educational potential of children with special needs including but not limited to educational placements of children by school committees, the departments of public health, mental health, and youth services and the department of social services in accordance with the regulations of the department of education; "School age child requiring special education", any child with special needs who requires special education as determined in accordance with the regulations set forth by the department.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 18. (9 Mass. Gen. Laws Ann. 184-85 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 2:

The department shall promulgate, in cooperation with the departments of mental health, public health and social services, regulations regarding programs for children with special needs including but not limited to a definition of special needs; provided, however, that such definition shall emphasize a thorough narrative description of each child's developmental potential so as to minimize the possibility of stigmatization and to assure the maximum possible development of a child with special needs, and, provided further, that such definition shall be sufficiently flexible to include children with multiple special needs. Children receiving or requiring special education shall be entitled to participate in any of the following programs: (1) additional direct or indirect instruction consultation service, materials, equipment or aid provided children or their regular classroom teachers which directly benefits children requiring special education; (2) supplementary individual or small group instruction or treatment in conjunction with a regular classroom program; (3) integrated programs in which children are assigned to special resource classrooms but attend regular classes to the extent that they are able to function therein; (4) full-time special class teaching or

treatment in a public school building; (5) teaching or treatment at home; (6) full-time teaching or treatment in a special day school or other day facility; (7) teaching or treatment at a hospital; (8) teaching or treatment at a short or long term residential school; (9) occupational and pre-occupational training in conjunction with the regular occupational training program in a public school; (10) occupational and pre-occupational training in conjunction with full-time special class teaching in a public school building, at home, special day school or other day facility, hospital, or short or long-term residential school; (11) any combination or modification of programs (1) through (10) or other programs, services, treatments or experimental provisions which obtain the prior approval of the department.

Admission to such programs on the pre-school level at an earlier age than at which schooling is ordinarily provided shall be regulated by the department in conjunction with the departments of public health and mental health and shall be restricted to children with substantial disabilities who are judged by said departments to require such programming.

No child shall be assigned to a special education class unless it is first determined by an evaluation of the child's needs and the particular special education program that the child is likely to benefit from such program; periodically thereafter, and in no event less often than annually the child and his program shall be reevaluated to determine whether said child is benefiting from said program in accordance with the procedures set forth in section three. In the event that said program is not benefiting the child and that another program may benefit the child more, or said program has benefited the child sufficiently to permit reassignment, the child shall be reassigned, and in the event of consistent failure of a program to benefit children there assigned, the program shall be abolished or altered.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 19. (9 Mass. Gen. Laws Ann. 187-88 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 3:

In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health and public health and with assistance of the department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise, every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education.

No school committee shall refuse a school age child with special needs admission to or continued attendance in public school without the prior written approval of the department. No child who is so refused shall be denied an alternative form of education approved by the department, as provided for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency or through any other program which is approved for the child by the department.

No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department.

Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining whether such child requires special education, the school committee shall notify the parents or guardians of such child in

writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the department and the departments of mental health and public health and the right to appeal from any evaluation, first to the department, and then to the courts.

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist.

The department jointly with the departments of mental health and public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the needs of the child is provided.

Those persons assessing said child shall maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education and medical treatment best suited to the child's needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counselling services. When the suggested

course of study is other than regular education those persons assessing said child shall present a method of monitoring the benefits of such special education and conditions that would indicate that the child should return to regular classes, and a comparison of expected outcomes in regular class placement.

If a child with special needs requires medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available, in accordance with regulations promulgated jointly by the departments of education, mental health, public health and social services in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made according to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the departments of mental health and public health or, at private expense, from any specialists.

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluation, shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate education

program. At the conclusion of said hearing, with the advice and consultation of appropriate advisory councils established under section one P of chapter fifteen, the department may recommend alternative educational placements to the parents, guardians or persons with custody, and said parents, guardians and persons with custody may either consent to or reject such proposals. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parents, guardians or persons with custody except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

If the parents, guardians or persons with custody reject the educational placements recommended by the department and desire a program other than a regular education program, the matter shall be referred to the state advisory commission on special education to be heard at its next meeting. The commission shall make a determination within thirty days of said meeting regarding the placement of the child. If the parents, guardians or persons with custody reject this determination, they may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child shall be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

Within ten months after placement of any child in a special education program, and at least annually thereafter the child's educational progress shall be evaluated as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned.

Evaluations and assessments of children and special education programs shall remain confidential and be used solely for the administration of special education in the commonwealth, including, but not limited to, inspection by the department and regional and state advisory councils to insure that every special education program does benefit the children there assigned.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 20. (9 Mass. Gen. Laws Ann. 188-91 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 4:

The school committee of any city, town or school district may, to meet its obligations under section three, with the approval of the department enter into an agreement with any other school committee to jointly provide special education or, subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, may enter into an agreement with any public or private school, agency, or institution to provide the necessary special education within the city, town or school district.

In the case of an agreement between school committees to jointly provide special education, said agreement shall designate one city, town or school district as the operating agent. Funds received by such operating agent from other cities, towns or school districts or appropriated by such operating agent for the purposes of such agreement, in addition to gifts and grants shall be deposited with and held as a separate account by its treasurer. The school committee may apply said funds to the costs of programs operated pursuant to the agreement without further appropriation.

St. 1972, c. 766, § 11. (9 Mass. Gen. Laws Ann. 193 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 5:

Any school committee which provides or arranges for the provision of special education pursuant to the provisions of section three shall pay for such special education personnel, materials and equipment, tuition, room and board, transportation, rent and consultant services as are necessary for the provision of such special education.

A school committee which incurs costs or obligations under the provisions of this section shall include within its annual budget an amount of money to comply with said provisions. Said amount shall be added to the annual budget appropriation for school purposes in each city or town for the support of public schools for the purposes of, and enforceable pursuant to, section thirty-four of chapter seventy-one, notwithstanding any general or special laws or charter provisions which limit the amount of money that may be appropriated in any city or town for school purposes.

St. 1972, c. 766, § 11, as amended by St. 1973, c. 318, § 1. (9 Mass. Gen. Laws Ann. 193 (West Supp. 1981).)

Massachusetts General Laws, Chapter 71B, Section 10:

The department may, on an annual renewal basis, upon the request of the parents or guardians and the recommendations of a local school committee and a regional branch of the division of special education, and with the approval of the secretary of educational affairs refer children requiring special education to any institution within or without the commonwealth which offers curriculum, instruction and facilities which are appropriate to the child's needs and which are approved by the department under regulations prescribed by the departments of education, mental health and public health. The curriculum at such an institution must for approval be equivalent, insofar as the department deems feasible, to the curriculum for children of comparable age and ability in the public schools of the commonwealth.

Before acting on said request the department shall determine the nature and extent of a child's special needs, shall require the local school committee and regional advisory council to prepare and submit plans detailing the time needed to establish facilities adequate for children with special needs in the city, town or school district where the child resides, and shall ascertain whether adequate facilities and instruction programs are available or when adequate facilities can be made available in the city, town or school district where the child with special needs resides. Until adequate facilities can be made available, such child shall be placed in the most adequate program available as determined by the department. The department shall further define by regulation the circumstances in which it shall be directly responsible for the placement of children in such special education programs, and by standards available to the public determine the methods and order of such placements; provided, however, that no child shall be denied access to any program operated by the department of mental health, public health or social services to which in the judgment of the operating department the child should be admitted.

The expenses of the instruction and support actually rendered or furnished to such children with special needs, including their necessary travelling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, may be paid by the commonwealth; but the department shall issue regulations jointly with the departments of mental health, public health, youth services and social services defining the circumstances in which the commonwealth shall bear all or part of such cost, the circumstances in which school committees shall be required to bear part or all of such cost, and the circumstances in which a parent or guardian may be required to reimburse the commonwealth for part or all of such cost; provided, however, that in no event shall the cost to the school committee for placement under this section be less than the average per pupil cost for pupils of comparable age within the city, town or school district; and, provided further, that in determining the cost to the parent or guardian, if any, no charge shall be made for any educational cost but only for support and care. In determining the cost to the parent or guardian the department shall apply criteria which take into account relative ability to pay.

The department shall direct and supervise the education of all such children, and the commissioner of education shall state in his annual report their number, the cost of their instruction and support, the manner in which the money appropriated therefor has been expended, to what extent reimbursed and such other information as he deems important.

Nothing contained herein shall affect the continued authority of the departments of mental health and public health over all non-educational programs and all treatment for residents or patients in institutions under their control.

St. 1972, c. 766, § 11, as amended by St. 1978, c. 552, § 21. (9 Mass. Gen. Laws Ann. 196-97 (West Supp. 1981).)

REGULATORY PROVISIONS

603 Code of Massachusetts Regulations, Section 28, Paragraph 205.1 (1979):

Nothing in these regulations shall be construed to limit the right of parents to have their children educated at private schools, completely at private expense.

603 Code of Massachusetts Regulations, Section 28, Paragraph 322.2 (1979):

Determination of need for special education; choice of prototype.

The Administrator of Special Education shall determine and state as part of the child's IEP whether the objectives set by the TEAM require for their achievement special education which is not available within the regular education program. The Administrator of Special Education shall state the reasons for the conclusion that the child does or does not require special education. If the child does require special education, the Administrator of Special Education shall complete the child's IEP by stating the prototype through which the child's program is to be provided and the specific program within such prototype. This decision regarding prototype and program shall be based on the type of services which are to be provided to the child, the types of group settings in which those services are to be provided (¶ 322.1(j)), the personnel who are to provide the services (¶ 322.3(a)), and the locations at which the services are to be provided (¶ 322.3(b)). The prototype selected shall be the least restrictive prototype which (by its terms set out in ¶ 502.0) allows the services recommended by the TEAM to be provided in the groups, by the personnel and at the locations chosen pursuant to ¶¶ 322.1(j), 322.3(a) and 322.3(b). Unless the child is to be placed in a Regional Adolescent Program under ¶ 502.7(b)(iv), the Administrator shall not select prototypes 502.7 (home or hospital), which is chosen only by a physician pursuant to ¶ 502.7(a); or 502.9 (diagnostic program) which is selected by

the TEAM pursuant to ¶ 323.4. The Administrator of Special Education shall recommend a specific program and service for a child only after the evaluation of the adequacy of said program or service indicates that the program or service can provide elements in the child's IEP.

603 Code of Massachusetts Regulations, Section 28, Paragraph 504.4(a) (1979):

If the Administrator of Special Education is unable to find an appropriate placement for a child that complies with the elements of the child's IEP, he/she may request assistance from the Division by submitting a letter to the appropriate Regional Branch Office of the Division requesting assistance and listing any schools that have been considered and the reason(s) given by the schools for not accepting the child. The letter shall be accompanied by a copy of the child's IEP, copies of all assessments from the evaluation, and the designation by the Administrator of a placement specialist who will work with the Division.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

SHEILA RENDELL-BAKER,
PETITIONER,

v.

SANDRA KOHN, ET AL.,
RESPONDENTS,

WAYNE KLUG, ET AL.,
PETITIONERS,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to
The United States Court of Appeals for the First Circuit

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In the
Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2102

REPLY BRIEF FOR PETITIONERS

Additional Regulatory Provisions

The following additional regulatory provisions are set out in the Appendix to this reply brief:

> 603 Code of Massachusetts Regulations, Section 7, Paragraphs 7.04(1), (2), (40), (41)(a)&(f), (42)(a)&(f), (43)(a)&(f), (44)(a)&(f), and (45)(a)&(f) [effective September 1, 1982];
>
> 603 Code of Massachusetts Regulations, Section 28, Paragraphs 322.0, 322.1, 504.4(b), 700.1-700.4, 802.0-802.19, 1000.0-1000.6 (1979).

Argument

This reply brief is filed by petitioners to address selected points raised by respondents New Perspectives School, Inc. [the "School"] and its directors [collectively, the "School respondents"], respondents Bellotti and Highgas [collectively, the "State respondents"], and the Massachusetts Association of 766 Approved Private Schools, Inc. [the "Association"], *amicus curiae*.[1]

[1] In addition to the abbreviations to the various appendices and records set forth in Petitioners' Brief at 3 n.4, the following abbreviations shall be used in this reply brief:

Appendix to Reply Brief (herein)	R.A.
Brief of the School Respondents	School Brief
Brief of the State Respondents	State Brief
Brief of the Association	Association Brief

I. The School was Performing the Sovereign Function of Providing Public Education.

The School respondents, the Association, and, to a lesser extent, the State respondents appear to make two closely-related arguments in response to petitioners' argument that the provision of special education under Chapter 766 is a public function. First, they argue that the function of providing education to children with special educational needs is constitutionally distinguishable from the function of providing education to children without such needs. Second, they argue that providing public education even to children without special needs is not a sovereign function because the function of providing education was not traditionally exclusively reserved to the state.

A. *Special Education is not Constitutionally Distinguishable From Public Education Provided to Children Without Learning Disabilities.*

The argument by respondents and the Association that special education is constitutionally distinguishable from ordinary education is based on two observations. First, special education is sometimes provided in private schools. Respondents and the Association attempt to distinguish it on this ground from the education provided in *Ambach* v. *Norwick*, 441 U.S. 68 (1979) [hereinafter, "*Ambach*"],[2] and to compare it to various forms of public assistance. The second observation is that, prior to 1972, the special education laws of Massachusetts were not as comprehensive as they became that year. While the observations themselves are true, neither supports the conclusion that special education is constitutionally distinguishable from public education provided to children without learning disabilities.

Considering the first observation, it should be apparent even on a superficial level that public functions cannot, in a constitutional sense, be distinguished from non-public functions on the basis of whether the function is being performed in a particular case by a

[2] *See* State Brief at 31 n.12; Association Brief at 14 n.14.

private entity. As cases like *Smith* v. *Allwright*, 321 U.S. 649 (1944), *Terry* v. *Adams*, 345 U.S. 461 (1953), and *Marsh* v. *Alabama*, 326 U.S. 501 (1946) [hereinafter, "*Marsh*"], establish, the hallmark of any public function is that it remains a public function regardless of where or by whom it is performed.[3]

Respondents and the Association contend that, if the public function doctrine is not confined in this case to teaching performed in state-owned buildings by state employees, there is no principled basis for distinguishing between the provision of education by private schools under Chapter 766 and the provision of other services by third-party vendors under purchase of service contracts with the state. They are mistaken. There is a fundamental distinction between education (special or otherwise) and other goods or services. Massachusetts children have a statutory right to suitable education. *See, e.g., Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 515, 417 N.E.2d 408, 415; *Amherst-Pelham Regional School Committee* v. *Department of Education*, 376 Mass. 480, 486-87, 381 N.E.2d 922, 927 (1978). Massachusetts residents have no statutory right to food, shelter, utility service, medical care, or other such services for which the state sometimes provides financial assistance.

Education is different. Massachusetts residents have a right to obtain suitable education, and the state has a correlative duty to provide it. In fact, education is compulsory. It is not difficult to understand why education has been singled out in this respect. Unlike subsidies which are provided for personal necessities, education is pro-

[3] The State respondents attempt unsuccessfully to distinguish *Terry* and *Marsh* on the ground that the private entities there entirely displaced the state. State Brief at 37-38. It is of course true that schools other than New Perspectives also provide special education in Massachusetts, but it is no less true that elections were held in many other counties in Texas which were not dominated by the Jaybirds and literature could be distributed in many other towns in Alabama which were not owned by the Gulf Shipbuilding Corporation. Indeed, in *Marsh* there was a concededly public highway just thirty feet from the privately-owned sidewalk at issue. 326 U.S. at 503. The fact that other schools, counties, or towns exist where people can go to express opinions without fear of dismissal or arrest or in which, regardless of their race, they may vote for public officials is no justification for permitting the abridgment of constitutional rights in a particular school, county, or town.

vided to meet society's collective need for a literate population, conscious of its civic obligations and sharing certain values necessary for the maintenance of our democratic institutions. This explains two of the characteristics which most distinguish education from other services subsidized by the state: It is compulsory, and it is provided to all, without regard to financial need. It also explains why public officials play such an active role in designing and implementing curricula, establishing requirements for teacher and school accreditation, and overseeing the proper maintenance of educational standards generally.

Even a cursory examination of Chapter 766 and the regulations thereunder reveals that, despite the occasional use of private schools to provide education to children with learning disabilities, a resident's statutory right to receive and the state's statutory duty to provide special education are now as firmly established as the right to receive and the duty to provide regular education. The respondents' and the Association's suggestions to the contrary notwithstanding, the state's duty is by no means limited to determining eligibility for special education "scholarships" or entering into purchase of service contracts with third-party vendors of educational services.[4]

[4] Specifically, public officials are initially charged with the responsibility for evaluating the physical, emotional, and psychological needs of each child suspected of having learning disabilities. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981); A. 4-5. They are then required to design an Individualized Educational Plan ("IEP") for each child diagnosed as having such needs. 603 Code Mass. Regs. § 28, pars. 322.0, 322.1 (1979); R.A. 11-13. The IEP is a detailed blueprint of the child's educational program. The IEP includes such specific items as quarterly and annual educational objectives, appropriate educational approaches and methods to achieve those objectives, the frequency and duration of particular types of instruction, the need for any special equipment or materials, and the size of the group in which instruction should be provided. 603 Code Mass. Regs. § 28, par. 322.1 (1979); R.A. 11-13. If at all possible, the IEP must be implemented by the child's regular public school to facilitate the child's full and immediate integration into society.

If appropriate education is unavailable at the local public school, then and only then may the school committee refer the child to an outside institution. Even then, however, much more is involved than providing tuition money and finding a private school willing to accept the child. First, before a school may even be considered eligible to receive a child referred by a local school committee, it must be accredited by the state. The standards for accreditation are much stricter than those applicable to

Instead, it embraces all aspects of special education.[5]

Even after the child is placed in the private school,[6] the state con-

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ordinary private schools. *Compare, e.g.*, 603 Code Mass. Regs. § 28, par. 802.4 (1979); R.A. 16 (requiring that all teachers providing education at approved Chapter 766 schools now be state certified or approved) *with* Mass. Gen. Laws Ann. ch. 76, § 1 (West Supp. 1981) (no requirement that school teachers in private schools not approved under Chapter 766 be state certified or approved). *See also* Guidelines for the Approval of the Day Educational Component in Private Schools Under Chapter 766; K.R. 105-140 [the "Guidelines"]. In order to be eligible to receive any particular child, the approved school is required by law to agree to implement the state-developed IEP, 603 Code Mass. Reg. § 28, par. 804.1 (1979); A. 14; *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 506, 417 N.E.2d 408, 410-11, regardless of any philosophical or pedagogical objections the school might have to the objectives, methods, or approaches specified in it. All of this underscores the state's ongoing interest and involvement in, and above all its continuous legal responsibility for, the child's education.

[5] The Association is mistaken when it states that parents of special needs children are "entitled . . . to select an alternative special education placement in a private school" if they are dissatisfied with the placement suggested by the school committee. Association Brief at 12-13. The School respondents appear to make the same error. School Brief at 23-24. The case they cite in support of this proposition, *Amherst-Pelham Regional School Comm.* v. *Dep't of Educ.*, 376 Mass. 480, 381 N.E.2d 922 (1978), held only that when the Bureau of Special Education Appeals determines that a program proposed by the school committee is inadequate and recommends that the child instead be placed in the same institution in which his parents had placed him pending appeal, the parents are entitled to reimbursement for tuition payments, retroactive to their rejection of the program held on appeal to be inadequate. The opinion makes clear, however, that the parents do not have a right to select an alternative placement. In fact, the court warned that parents who, pending appeal, enroll their child in a school not recommended by the school committee "assume[ ] a financial risk that the bureau [will] recommend a different placement." 376 Mass. at 493, 381 N.E.2d at 931.

[6] Although both the School respondents, School Brief at 5, and the Association, Association Brief at 2-3, maintain that the School controls its own admissions, the record suggests otherwise. For instance, the contract between the School and the Boston School Committee provides, in Article I, that the School "*shall* provide services to 28 pupils" and that "if pupils are referred to the [School] for service in excess of the number provided for under this contract, the [School] shall not be required to accept such extra students if the addition of such students would exceed their capacity or if the [School] is not equipped to conform to said extra students [sic] educational plan." K.R. at 91-92 (emphasis added). The School therefore appears to have no discretion with respect to the acceptance of students referred by the Boston School Committee. If it can accommodate them and if it is "equipped" to implement their IEP's, it must accept them.

tinues to exercise ultimate responsibility for the course of his education.[7] The school is required to report periodically on the child's progress, with a view toward returning the child to his regular public school as soon as possible. 603 Code Mass. Regs. § 28, par. 804.2 (1979); A. 14. Moreover, the state is required to continue to evaluate the child's needs and to revise his IEP whenever necessary. Mass. Gen. Laws Ann. ch. 71B, §§ 2, 3 (West Supp. 1981); A. 3-9. *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 506, 417 N.E.2d 408, 410. Thus, the state never ceases to have ultimate responsibility for the structure, content, and progress of the child's education, as well as for its entire cost.[8]

Although the point could hardly be clearer that the state's responsibility for the provision of special education is quantitatively and qualitatively different from its responsibility for various other goods and services for which public assistance is occasionally provided,

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[7] As discussed in note 4, *supra*, with respect to individual children referred by school committees, the Association is wrong when it asserts that "Chapter 766 does not authorize the state . . . to require the adoption of any particular educational program" and that "the operation of private schools providing special education is independent of state control." Association Brief at 15, 17. Similarly, the Association and the School respondents are incorrect when they assert that the only recourse of a school committee dissatisfied with a placement is removal of the child from the school. Association Brief at 16; School Brief at 5. Since the school must agree to implement the child's IEP, it would be liable for breach of contract if it failed to do so. See also Contract for Special Educational Services Between The Boston School Committee and New Perspectives School, Inc., Articles I and IX, which expressly make the School liable for its failure to carry out each child's educational plan. K.R. 91, 97-98.

[8] "This close monitoring of a child placed in a private school, and of the private school itself under c. 766 and its regulations, suggests that both in purpose and effect the statute does not aid the private school in carrying out its essential function . . . . Rather, the statutory scheme fulfills *the obligation of the public school system* which has itself chosen not to provide the services in its own schools." *Commonwealth* v. *School Comm. of Springfield*, Mass. Adv. Sh. [1981] 502, 519, 417 N.E.2d 408, 417-18 (footnote and citations omitted; emphasis added). Since the public school system is ultimately responsible for the provision of special education, it is difficult to understand the Association's argument that, because the statute permits school committees to contract with private schools, there has been no delegation. Association Brief at 23. The argument is apparently based on the erroneous premise that there can only be a delegation of responsibility when the delegation is unauthorized.

any possible doubt is dispelled by 603 Code Mass. Regs. § 28, par. 504.4(b) (1979); R.A. 13 (emphasis added), which provides:

> If the administrator of Special Education Programs . . . cannot locate any program that can provide all elements of the child's IEP, the school committee shall request assistance from the Division in obtaining money with which to establish a program. *If no such program can be located, the school committee shall, with or without outside financial assistance, establish such a program itself or through a collaborative.*

Thus, the state is not only the provider of first resort, but the provider of last resort as well.[9] Unlike housing, medical care, nutrition, utilities, or any other good or service for which subsidies or third-party payments may be provided, the state guarantees that each child, regardless of financial need, shall have suitable, publicly-funded education, the structure, content, and provision of which is determined and monitored by the state *even if the state must establish a suitable program itself.*[10] This is indeed the essence of the distinction between services like education, to which there is a right, and services like medical care, toward which the state makes only a financial contribution but generally which are not otherwise the

[9] If the School respondents are correct that "the best means of testing the requirement of 'tradition' is to ask whether the service or function in question is so intimately related to our historic notion of 'state-ness' that it would be supplied by the state but for the existence of the private counterpart," School Brief at 21, then even they must concede that Massachusetts has attempted to supply by statute and regulation what they argue is absent in tradition. In any event, the School respondents err when they maintain that special education, at least in Massachusetts, "is not a service 'of such public importance that the State invariably either provides the service itself or permits private companies to act as state surrogates in providing it.' " *Id.*, *quoting Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 372 (1974) (Marshall, J., dissenting) [hereinafter, "*Jackson*"].

[10] It is also significant that Chapter 766 appears to have made public education compulsory for children with special needs. 1972 Mass. Acts ch. 766, § 12, *amending* Mass. Gen. Laws ch. 76, § 1 (making exemption from compulsory education law for physically or mentally disabled students "subject to" the provisions of Chapter 766). Needless to say, there are no comparable laws compelling citizens to take advantage of the state's other public assistance programs. This again underscores the point that society is the ultimate beneficiary of special education programs.

responsibility of the state to provide.[11] The attempt by respondents and the Association to draw a constitutional distinction between special education and regular education thus overlooks the dispositive element which special and regular education have in common and which distinguishes them from such other services. The state has undertaken to provide both forms of education as a matter of right. In doing so, it has firmly committed itself to providing all residents with a suitable public education.

The observation that the Massachusetts special education laws were less comprehensive before 1972 is also an invalid basis for drawing a constitutional distinction between the public education now provided to children with special needs and that provided to children without learning disabilities. For too long, Massachusetts gave preference to children without special needs. The adoption of Chapter 766 in 1972 marked a turning point; it signified a legislative recognition of society's obligation for the development of the full educational potential of every child. It makes no sense to declare as a matter of federal law that Massachusetts is forever precluded from fully integrating special needs children into its system of public education and, ultimately, society simply because this recognition was belated.[12] States can and must be permitted to determine for themselves the kinds of programs, including special education programs, which they can mandate in their systems of public education.[13] By statute, Massachusetts has chosen to include special

[11] *See, e.g.*, Butler, *The Medicaid Program: Current Statutory Requirements and Judicial Interpretations*, 8 Clearinghouse Rev. 7, 12 (1974).

[12] Such a result would be comparable to holding that constitutional standards apply to traditional academic courses but not to kindergarten or vocational education programs or, indeed, even to new academic courses which are recently added to an existing curriculum.

[13] Even prior cases which have applied the tradition and exclusivity test have never suggested that the precise contours of a public function are forever determined with reference to particular services performed under the rubric of that function in the past. *See, e.g., Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978) [hereinafter, "*Flagg*"]. In any event, if petitioners are correct that a sovereign function may be declared by statute as well as by virtue of being traditionally exclusively associated with sovereignty, then it is irrelevant that the present special education scheme dates back only to 1972.

education programs as part of its public education curriculum, thus making regular education and special education constitutionally indistinguishable. The inquiry therefore properly returns to the question reserved in *Flagg* and, it would appear, answered in *Ambach*: Is public education a sovereign function?

B. *Public Education is a Sovereign Function.*

Flagg expressly and necessarily reserved the question of whether public education is a sovereign function.[14] Respondents and the Association reply that even if *Flagg* left open this question, then, notwithstanding *Ambach* and the other arguments presented in Petitioners' Brief, the question must be answered in the negative. Otherwise, they argue, our long tradition of independent private education would be in jeopardy. That simply is not so. When parents exercise their constitutional right to reject public education

[14]Despite the fact that *Flagg* expressly reserved the question whether public education is a sovereign function, 436 U.S. at 163-64, respondents and the Association continue to insist that *Flagg* decided this issue in their favor. In order to make it even clearer that *Flagg* did not decide this question, it may be helpful to disregard for the moment the express reservation language in *Flagg* and ask whether, apart from that language, the present inquiry is foreclosed. The answer is surely no. *Flagg* held only that dispute resolution is not so traditionally and exclusively associated with sovereignty that all dispute resolution, including private dispute resolution, invariably involves the exercise of sovereign power. *Flagg* did not consider the very different question whether dispute resolution is a sovereign function when performed by the state or its delegate in response to a resident's exercise of his right to submit his dispute to the judicial process for resolution. For example, it did not consider what would have happened if respondents in *Flagg* had brought suit in state court to replevy their goods and if the state court judge, in accordance with state law, *see, e.g.*, Mass. R. Civ. P. 53, 365 Mass. 730, 817 (1974), had referred the matter to a private special master. Even though private dispute resolution is not a public function, the private master would be under a constitutional obligation to find the facts in a fair and impartial manner. *See Schwimmer* v. *United States*, 232 F.2d 855, 865 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956) ("But since the thing being done by a Master is a judicial incident, it necessarily is subject to such judicial standards as are applicable to any performance of it by the Court itself"). Since *Flagg* was concerned only with the determination of whether private dispute resolution remains a public function even when neither party exercises his statutory right to submit the dispute to the judicial process, it did not decide the question presented here, which is whether a private entity performs a public function when it discharges the state's obligation to provide goods or services to which residents are entitled by statute.

in favor of private education, *see, e.g., Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the schools to which they send their children do not perform a public function and, quite properly, are not subject to the Fourteenth Amendment when they provide education to those children. It is only when a parent claims his statutory right to have the state provide his child a suitable public education that the Fourteenth Amendment comes into play, whether the state discharges its obligation by providing instruction in a traditional public school or through an ostensibly private school like New Perspectives.[15]

Moreover, even schools which accept children referred under Chapter 766 need not fear that their educational independence will be jeopardized if the Court holds that teachers enjoy the protection of the Fourteenth Amendment. In the first place, a teacher's right to speak out on such matters as educational philosophy, course content, or methods of instruction will still be subject to reasonable time, place, and manner restrictions. *See Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 415 n.4 (1979). More important, the right to express an opinion does not carry with it the right to make a decision. Subject to school policy and Chapter 766 requirements, school administrators will be free to disregard the views of teachers and will have final decision-making authority on matters of educational policy.

Respondents' final argument against recognition of public education as a public function is that a school which accepted the referral of even one child under Chapter 766 would then be subject to the full range of Fourteenth Amendment obligations in all its activities. Again, respondents are mistaken. Petitioners are advocating a functional approach, analogous to that adopted in *Polk County* v. *Dodson*, ___ U.S. ___, 50 U.S.L.W. 4077 (December 14, 1981). Under this approach, a school would be subject to the Fourteenth

[15] "The private placement provisions of c. 766 only apply to a child *who seeks services in the public school system* and who is then identified as requiring special services which the school system either cannot, or chooses not to, provide." *Commonwealth* v. *School Comm. of Springfield*, Mass. Adv. Sh. [1981] 502, 514, 417 N.E.2d 408, 415 (emphasis added).

Amendment only to the extent it was performing a public function -- that is, only to the extent it was discharging the state's obligation to provide suitable education to Chapter 766 students. Petitioners do not deny that there may be instances where a school policy of general application has only an incidental impact on the education provided to a child referred under Chapter 766, or that, depending upon the significance of the impact, reasonable persons might differ as to the appropriate decision in such a case. The fact, however, that there may be marginal cases should not determine the outcome of this case, where all the students at the School were referred by public authorities,[16] where petitioners are teachers and counselors who allege they were discharged for exercising a right which the Court has repeatedly held to be especially critical in the field of education, and where the speech for which petitioners allege they were discharged was closely related to the School's provision of special education.[17] Nor should it prevent the Court from providing

[16] The State respondents maintain that the School could have accepted private referrals. State Brief at 7, 16. The record is clear, however, that all fifty students at the School in December, 1977 had been referred by school committees or state agencies. J.A. 90. Even the seven students who were referred by state agencies, as distinguished from school committees, presumably were referred pursuant to Chapter 766 and the regulations thereunder. *See* Mass. Gen. Laws Ann. ch. 71B, §§ 1-3 (West Supp. 1981); A. 2-9; 603 Code Mass. Regs. § 28, par. 700 (1979); R.A. 14-15.

[17] The State respondents maintain that even if the School was performing a public function, the dismissal in *Rendell-Baker* was "unrelated to the school's provision of Chapter 766 education." State Brief at 41. The speech for which Ms. Rendell-Baker alleges she was dismissed was speech at a meeting of the School's Board of Directors in which she supported a request by her students that they be given more responsibility in school affairs. One would have to take an exceedingly restrictive view of what constitutes the educational process to conclude that teachers and educational counselors who support the requests of their students for more responsibility in school affairs are acting outside the scope of their teaching and counseling responsibilities or that the School's dismissal of teachers and counselors in retaliation for such speech is "unrelated to the school's provision of Chapter 766 education." Such a restrictive view would certainly be inconsistent with the view of the role of teachers and the educational process which the Court articulated in *Ambach*.

Moreover, Massachusetts itself apparently takes no such narrow view of the role of special needs teachers. Effective September 1, 1979, all new professional personnel hired by Chapter 766 approved schools have to be certified or approved. 603 Code

guidance to lower courts by articulating the appropriate legal standard to be applied in future cases. For all that has been written, that standard is both narrow and simple: Ostensibly private schools should be regarded as instrumentalities of the state for purposes of the Fourteenth Amendment and 42 U.S.C. § 1983 at least to the extent that they are retained by

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Mass. Regs. § 28, par. 802.4; R.A. 16. Such professional personnel are to be approved under Regulations for Approval of Professional Personnel for Special Education adopted by the State Board of Education. 603 Code Mass. Regs. § 28, par. 1000.0; R.A. 18. The Board of Education published new regulations governing the certification of teachers of special needs students on June 14, 1979, effective September 1, 1982. Massachusetts Register No. 162 (June 14, 1979). Regarding classroom teachers in general, these new regulations provide as follows:

> The effective teacher is equitable, sensitive and responsive to all learners. To meet this standard, the candidate will demonstrate that he or she:
>
> 1. defends and encourages the exercise of students' rights to equal treatment and freedom of expression
> 2. responds to the needs of individual students so as to enhance their self-esteem
> 3. works toward a learning environment favorable to open inquiry and devoid of ridicule
> 4. encourages a positive atmosphere for all students, especially those with special needs
> 5. avoids and discourages racial, sexual, social, ethnic, religious, physical, and other stereotyping . . . .

603 Code Mass. Regs. § 7, par 7.04(2)(e) [effective September 1, 1982]; R.A. 4. With respect to teachers of special needs students, in particular, the new regulations provide:

> [T]he candidate will demonstrate that he or she:
>
> 1. responds to the needs of individual students so as to enhance their self-esteem and development
> 2. establishes constructive relationships with parents and others primarily concerned with the well-being of his or her students
> 3. works to develop a learning environment which is favorable to openness of inquiry and devoid of ridicule . . . .

603 Code Mass. Regs. § 7, par. 7.04(40)(f) [effective September 1, 1982]; R.A. 8. Of course, because these regulations are not yet effective and would not appear to be retroactive, petitioners do not contend that they control the instant case. However, these regulations do evince the state's recognition that effective teaching is not limited to course instruction.

the state to discharge the state's legal obligation to provide educational services.

II. Considering the Purpose of the State Action Requirement, the School's Actions Must be Fairly Treated as Those of the State Because Substantial Traditional Indicia of State Action are Present and the Balance of Interests in this Case So Warrants.

Petitioners argue in their principal brief that the action of the School is properly attributable to the state not only because the School is discharging a public function, but also because, taking into account (1) the substantial indicia of state action which are present, (2) the fundamental purpose of the state action requirement, and (3) the constitutional interests competing in this case, petitioners' free speech interests warrant greater protection than the School's privacy interests. The respondents and the Association seek to dismiss this basis for state action on three alleged grounds: (1) it is novel; (2) it eliminates the state action requirement and subsumes the merits of the litigation in the state action determination; and (3) in any balancing of interests, the respondents' interest in institutional autonomy should prevail.[18] Each of these arguments will be addressed in this portion of petitioners' reply brief.

Because there are significant errors in respondents' and the Association's restatement of petitioners' position, it may be helpful at the outset to review very briefly just what petitioners are and are not advocating. First, petitioners are not advocating that the Court abandon its search for traditional indicia of state action such as substantial public funding and regulation, interdependence between the public and private sectors, and the performance by a private actor of a function commonly associated with sovereignty. Nor is petitioner advocating that the Court discard or even relax the

[18] In addition, the State respondents suggest that petitioners' second basis for state action was not fairly encompassed by the petition for certiorari. State Brief at 57 n.24. This latter suggestion notwithstanding, the balancing approach which serves as the petitioners' second basis for state action is set out — in great detail — in the petition for certiorari. *See* Petition for Certiorari at 52-57.

requirement that such factors be present to some significant degree before a court may treat a private party as an instrumentality of the state. Petitioners' position should be clear: When traditional indicia of state action are present such that a fair question arises as to whether there is sufficient public involvement to consider certain actions to be "state action," it is appropriate to decide that question by examining the interests competing for protection in light of the purpose of the state action requirement.

A. *The Examination of the Purpose of a Constitutional Provision is not Novel but is a Fundamental Tenet in Constitutional Adjudication.*

The examination of the purpose of a constitutional provision and the determination of how that purpose would best be served in a particular case are perhaps among the oldest tenets in American jurisprudence. *See, e.g., McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 407 (1819) (relying on the purpose of the constitutional powers granted the federal government to uphold the creation of a national bank); *cf. Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 177 (1803) (relying on the fundamental principle underlying a constitution to support judicial review). Moreover, the examination of constitutional purpose has never been confined to the great questions first considered by the Marshall Court. *See, e.g., United States* v. *Classic,* 313 U.S. 299, 316 (1941).[19]

[19] In *United States* v. *Classic,* 313 U.S. 299 (1941), Justice Stone wrote for the Court:

> [I]n determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government . . . . If we remember that 'it is a Constitution we are expounding,' we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose.

Id. at 316 (citations omitted).

The fundamental purpose of the state action requirement of the Fourteenth Amendment is to protect legitimate zones of privacy against unauthorized judicial encroachment. Since the state, *qua* state, has no legitimate zone of privacy, any abridgment by the state of liberties which are the subject of the Fourteenth Amendment, such as the mandatory separation of the races, is prohibited. At the other end of the spectrum, purely private discrimination, such as an individual's refusal to admit certain persons into his home because of their race, religion, or political beliefs, involves the exercise of a legitimate privacy right and is beyond the reach of Section 1 of the Fourteenth Amendment. Between these two extremes, however, public and private activity may combine in literally countless ways, and it is often far from clear whether the action should be considered public or private for purposes of the Fourteenth Amendment.[20] Under those circumstances courts should and do[21] weigh the competing constitutional interests and strike a balance true to the purpose of the state action requirement. This reliance on the purposes behind the state action requirement is particularly appropriate in difficult cases. For example, in *Terry* v. *Adams*, 345 U.S. 461 (1953), the Court found that the all-white primary of the

[20] It should be clear from what has been said thus far that petitioners do not take the position that the only conduct which is beyond the reach of the Fourteenth Amendment is conduct which is also beyond the reach of the state's police power. Under petitioners' balancing analysis, a court might well conclude that privacy interests in a particular case outweigh, for example, due process interests, as was the case in *Jackson*, even though the state could have prohibited the challenged conduct under its police power had it chosen to do so. Thus, to the extent that state action requirement also stands as a barrier against the erosion of federalism principles, *see generally* L. Tribe, *American Constitutional Law* § 18-2 at 1149 (1978), petitioners' balancing approach will in no way impede the performance of that vital function.

[21] *E.g.*, *Marsh*, 326 U.S. at 509 (1946) (quoted and discussed in Petitioners' Brief at 29-30). Contrary to the suggestion of the State respondents, State Brief at 60-61 n.27, the balancing of interests undertaken by the *Marsh* Court did not occur only after state action had been found. At the outset of its opinion, the Court in *Marsh* noted that the town of Chickasaw's ban on free speech clearly would have been unconstitutional had the town been a traditional municipal corporation. 326 U.S. at 504. Hence the only question for the Court to decide was state action, *id.* at 505, and it was in deciding this issue that the Court noted the balance between the rights of free speech and private property. *Id.* at 509.

Jaybird Democrats, a primary which preceded the regular Democratic primary, constituted state action which violated the Fifteenth Amendment. All three opinions for the majority in *Terry* relied on constitutional purpose.[22]

In asking the Court to consider the constitutional interests at stake and to measure those interests in light of the fundamental purpose of the Fourteenth Amendment and the state action requirement, the petitioners ask the Court to do no more than the Court has done before, both in state action cases and in other constitutional litigation. State action questions cannot be decided in a vacuum, but only with reference to the interests at stake and the purpose of the requirement.

B. *The Proposed Test Neither Eliminates the State Action Requirement Nor Subsumes the Merits of the Litigation in the State Action Determination.*

Respondents and the Association contend that petitioners' second basis for state action either eliminates the state action require-

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[22] In an opinion for three members of the Court, Justice Black relied on the purpose of the Fifteenth Amendment and concluded that the Amendment did not permit the functional equivalent of an all-white primary sponsored by the county. 345 U.S. at 469. In an opinion for four members of the Court, Justice Clark relied on the "broad and lofty aims" of the Fifteenth Amendment to conclude that where a state had effectively "devolve[d] upon a political organization the uncontested choice of public officials" that political organization must be regarded as a state actor. *Id.* at 484. In a separate opinion, Justice Frankfurter also devoted considerable attention to the need to rely on the underlying purpose of the Fifteenth Amendment in deciding the state action question:

> This case is for me by no means free of difficulty. Whenever the law draws a line between permissible and forbidden conduct cases are bound to arise which are not obviously on one side or the other. These dubious situations disclose the limited utility of the figure of speech, a 'line,' in the law. Drawing a 'line' is necessarily exercising a judgment, however confined the conscientious judgment may be within the bounds of constitutional and statutory provisions, the course of decisions, and the presuppositions of the judicial process. If 'line' is in the main a fruitful tool for dividing the sheep from the goats, it must not be forgotten that since the 'line' is figurative the place of this or that case in relation to it cannot be ascertained externally but is a matter of the mind.
>
> Close analysis of what it is that the Fifteenth Amendment prohibits must be made before it can be determined what the relevant line is in the situation presented by this case.

Id. at 472.

ment[23] or subsumes the merits of the case in the state action determination.[24] Both contentions are without foundation. Petitioners' second basis for state action requires a balancing of the constitutional interests at stake in light of the purpose of the Fourteenth Amendment and the state action requirement, but it also carefully limits that balancing to instances in which substantial, traditional indicia of state action are already present. Petitioners' Brief at 31-34. Moreover, the consideration of competing constitutional interests for the purposes of the state action determination is a distinct test from a consideration of the merits of the litigation. *See* Petitioners' Brief at 34-41.

Rather than address petitioners' second basis for state action, the respondents and the Association focus their arguments on commentary which they contend would eliminate the state action requirement if adopted by the Court. Petitioners noted the arguments of commentators in their brief, *see, e.g.*, Petitioners' Brief at 31 n.31, but also expressly distinguished the arguments of those commentators from the petitioners' test. *Id.*

In the case at bar, the traditional indicia of state action are clearly sufficient to belie the notion that the School's conduct was purely private: interdependence between the state and the private entity; substantial state funding and regulation; the express delegation of the traditional governmental function of education; and the virtually complete dependence of the School on the state for all of its business. *See* Petitioners' Brief at 34-35. Thus to hold that the action of the School amounted to state action requires no compromise whatsoever of the principle that the state must have some significant affirmative involvement before the Fourteenth Amendment applies. Petitioners' analysis merely acknowledges that the significance of traditional indicia of state action often cannot be determined by the mechanical process of seeing if a similar configuration of indicia were ever presented before to the Supreme Court. Indeed, this Court itself recently suggested that similar indicia of state action may nonetheless produce different state action

[23] *See* School Brief at 29-30; Association Brief at 26.

[24] *See* School Brief at 29-31; State Brief at 61; Association Brief at 26.

determinations.[25] Manifestly, the petitioners' analysis does not eliminate the state action requirement; it only provides a rational framework for its application by lower courts.

Respondents and the Association also mistakenly argue that petitioners' balancing approach substitutes an inquiry on the merits for the state action inquiry. The two inquiries are distinct. The state action analysis balances the free speech interests of teachers, students, parents, and the community against the School's claim that it is sufficiently independent of the State that it need not even account to any of those constituencies for its decision to censor teachers. The analysis on the merits assumes that the School is accountable and balances free speech interests against the interest of any school, public or private, to be free from excessive disruption of the educational process. *See, e.g., Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 284 (1977); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). The outcome of the balancing on the merits may depend upon any number of factors, including, for example, whether the speech was made publicly or privately, *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 415 n.4 (1979), or its purpose and its effect, if any, on the educational process. On this record, however, since the courts below did not even reach the merits, respondents are foreclosed from arguing that the petitioners' speech was "disruptive" or "therapeutically contra-indicated for the particular handicapped children for whom the school has undertaken the responsibility of education and care." Association Brief at 26, 27. *See also* School Brief at 31-32. Those are precisely the kinds of inquiries a lower court would properly make if the merits were reached.

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[25] *Compare Branti* v. *Finkel*, 445 U.S. 507 (1980) (public defender acts under color of state law when he makes personnel decisions on the basis of political affiliation) *with Polk County* v. *Dodson* ____ U.S. ____, 50 U.S.L.W. 4077, 4080 (December 14, 1981) (public defender does not act under color of state law when she dismisses an appeal as frivolous).

C. *In Striking the State Action Balance, Petitioners' Free Speech Interests Outweigh the Privacy Interests of the School.*

The School respondents argue that, on balance, their "constitutional right to free association, privacy and institutional autonomy" outweigh petitioners' free speech interests. School Brief at 31. The Association contends that the rights of private schools to develop and implement independent educational philosophies outweigh petitioners' free speech interests, and that, by electing to teach in the School, petitioners waived their right to freedom of expression. Association Brief at 28-30.

Considering the waiver issue first, if there were any waiver, it was surely by the School, not by petitioners. It was the School which elected to become an adjunct of the public education system by accepting state funding and students referred by state agencies, by submitting to state regulation, and by agreeing to discharge the state's obligation to provide referred students with the suitable education which is theirs by right. Petitioners, on the other hand, no more waived their constitutional rights than did black voters in *Terry* who chose to live in Fort Bend County, Texas or employees of the Gulf Shipbuilding Company in *Marsh* who chose to live in Chickasaw, Alabama. In fact, since state law would have prohibited the referral of students to the School if the traditional public school had been able to provide them suitable education, petitioners had little, if any, choice other than to teach at a school such as New Perspectives if they wished to teach such students at all. Finally, there is the more fundamental question of whether students who are sent to the School by the state to receive their public education, the parents of such children, the taxpayers who pay for that education, and concerned citizens also have a sufficient interest in preserving teacher free speech to warrant constitutional protection for it. Surely they have. Just as surely, it would be anomolous to hold that the very fact that a private school is providing public education not only gives rise to the need for such protection but at the same time constitutes the justification for withholding it.

Concerning the issue of institutional autonomy, it must again be emphasized that the issue before the Court is not whether the School must adopt or even listen to petitioners' speech. That decision will remain the School's, whatever the final outcome of this case. Nor is the issue even whether petitioners had the right to utter the particular remarks they did, under the circumstances they uttered them, since that question goes to the merits and, on remand, is properly addressed by the lower court. The only issue before this Court is whether the School should be at all accountable for its attempt to suppress petitioners' speech. It is difficult to see how the School's educational mission will in any way be jeopardized merely because, having assumed responsibility for the provision of public education, the School is called upon to justify its attempt to censor the teachers and counselors who provide that education.

Conclusion

For the reasons stated in Petitioners' Brief and herein, the judgment of the court of appeals in *Rendell-Baker* should be reversed, and the case should be remanded for further proceedings. Similarly, the judgment of the court of appeals in *Klug* should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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APPENDIX

ADDITIONAL REGULATORY PROVISIONS

603 Code of Massachusetts Regulations, Section 7, Paragraphs 7.04(1), (2), (40), (41)(a)&(f), (42)(a)&(f), (43)(a)&(f), (44)(a)&(f), and (45)(a)&(f) (effective Sept. 1, 1982):

7.04 *Individual Programs and Program Standards*

(1) *General.* The standards listed in this section will be used to evaluate institutional programs as described in Section 7.03, individual programs as described below, and individual experience as described in Section 7.05. Applicants for certification who have not completed an approved institutional program and who are not applying through the alternative procedures described in Section 7.05, must submit to the Bureau proof of successful completion of the semester hour and other requirements listed below under the certificate sought. It is the responsibility of the candidate to establish to the satisfaction of the Bureau that the courses and other experiences submitted were appropriate to the development of the competencies specified under each of the standards. Courses counted toward one certificate may be counted towards additional certificates if they meet the standards, but practicums and internships will be counted towards one certificate only.

(2) *Classroom Teacher. (Common Standards)*

(a) *Standard I.* The effective teacher is knowledgeable in the field proposed for certification. (The competencies required to meet this standard are listed under each classroom teaching certificate.)

(b) *Standard II.* The effective teacher communicates clearly, understandably, and appropriately. To meet this standard, the candidate will demonstrate that he or she:

1. gives clear and concise explanations and directions

2. frames questions so as to encourage inquiry
3. uses appropriate metaphors, examples, and illustrations
4. makes the goals of teaching and learning clear to students
5. uses language appropriate to the age, developmental stage, special needs, and social, racial, and linguistic background of his or her students
6. serves as an example of clear and effective oral and written communication
7. listens to students
8. communicates effectively with parents

(c) *Standard III.* The effective teacher designs instruction to facilitate learning consistent with the needs and interests of the learners and so as to maintain a sense of order and purpose in the classroom. To meet this standard, the candidate will demonstrate that he or she:

1. understands the needs and interests of his or her students and designs or adapts the curriculum to meet these needs and interests
2. has clear goals for student learning
3. relates the elements of instruction sequentially to each other, to other fields of knowledge, to students' experiences, and to long-term goals
4. understands developmental psychology, and relationships between stages of growth

5. uses materials, media, and techniques appropriate to the age, developmental stage, special needs, and social, racial and linguistic background of his or her students, both individually and as a class
6. uses materials, media, and techniques suited to the subject matter and to meeting the goals of instruction
7. teaches, as necessary, the basic academic skills (reading, communication, mathematics) related to the goals of instruction
8. is aware of recent developments in teaching, particularly in his or her field(s) of knowledge
9. understands techniques of classroom management and how to maintain a sense of order in the classroom
10. makes effective use of appropriate resources in the community

(d) *Standard IV.* The effective teacher uses the results of various evaluative procedures to assess the effectiveness of instruction. To meet this standard, the candidate will demonstrate that he or she:

1. uses evaluative procedures appropriate to the age, developmental stage, special needs, and social, racial, and linguistic background of his or her students, and corrects for any ethnic, racial, or sexual bias in evaluation

2. interprets the results of evaluative procedures, and uses these results to improve instruction both for the class as a whole and for individual students
3. identifies problems in reading which inhibit learning and works toward remedying these problems
4. encourages the involvement of students in evaluation of instruction
5. evaluates his or her own role, behavior, and performance in the classroom

(e) *Standard V.* The effective teacher is equitable, sensitive, and responsive to all learners. To meet this standard, the candidate will demonstrate that he or she:

1. defends and encourages the exercise of students' rights to equal treatment and freedom of expression
2. responds to the needs of individual students so as to enhance their self-esteem
3. works toward a learning environment favorable to open inquiry and devoid of ridicule
4. encourages a positive atmosphere for all students, especially those with special needs
5. avoids and discourages racial, sexual, social, ethnic, religious, physical, and other stereotyping
6. makes allowances for biases and limitations in his or her own background which limit his or her responsiveness to students from other backgrounds.

(40) *Teacher of Young Children with Special Needs*
(3-7 years old)

(a) *Requirements*

1. completion of a pre-practicum consisting of 30 semester hours of course work and other experiences as defined in Standards I-V below
2. completion of a practicum, judged successful on the basis of Standards I-V, one-third of which must be with young children (3-7 years old) identified as needing special education, and one-third of which must be with young children not so identified

(b) *Standard I.* An effective teacher of young children with special needs knows:

1. developmental psychology and the psychology of early childhood in general
2. in particular, the characteristics and the educational, social, and emotional significance of developmental deviations and special needs
3. theories of learning; theories of language acquisition, the normal sequence of language development, and the effect of language disorders on learning
4. characteristics of family, parent-child, and sibling relationships, and their significance for young children with special needs
5. the subject matter of early childhood education

6. federal and state laws and regulations pertaining to special education, and community and governmental resources for young children with special needs

(c) *Standard II.* The effective teacher of children with special needs communicates clearly, understandably, and appropriately. To meet this standard, the candidate will demonstrate that he or she:

1. uses language appropriate to the age, developmental stage, and social, racial, and linguistic background of his or her students
2. makes the goals of teaching and learning activities clear to students
3. gives clear and concise directions and explanations
4. uses non-verbal communication appropriately and alternative communication systems as needed
5. listens to students

(d) *Standard III.* The effective teacher of children with special needs designs instructions to facilitate learning consistent with the needs and interests of learners and so as to maintain a sense of purpose and order in the classroom. To meet this standard, the candidate will demonstrate that he or she:

1. systematically observes and records student behavior and student-teacher interaction
2. consults with other school personnel, other professionals, and parents concerning specific techniques for motivation

3. develops and implements appropriate educational plans
4. designs and implements appropriate instructional programs, both academic and vocational
5. selects, adapts, and designs materials and procedures for learners in these programs
6. identifies and adapts environmental elements in the classroom which will enhance learning
7. uses a variety of instructional techniques

(e) *Standard IV.* The effective teacher of children with special needs uses the results of various evaluative procedures to assess the effectiveness of instruction. To meet this standard, the candidate will demonstrate that he or she:

1. uses and interprets evaluative procedures appropriate to the age, developmental stage, social, racial, and linguistic background, and ability of his or her students
2. monitors progress through periodic checks of individual students' mastery of specified objectives
3. systematically uses data from observation and assessment to make decisions on programmatic changes
4. evaluates his or her own role, behavior, and performance

(f) *Standard V.* The effective teacher of children with special needs is equitable, sensitive, and responsive to all learners. To meet this standard, the candidate will demonstrate that he or she:

1. responds to the needs of individual students so as to enhance their self-esteem and development
2. establishes constructive relationships with parents and others primarily concerned with the well-being of his or her students
3. works to develop a learning environment which is favorable to openness of inquiry and devoid of ridicule
4. makes allowances for biases and limitations in his or her own background which restricts his or her responsiveness to students from other backgrounds

(41) *Teacher of Children with Severe Special Needs* (N-12)

(a) *Requirements*

1. completion of a pre-practicum consisting of 30 semester hours of course work and other experiences as defined in Standards I-V, below.
2. completion of a practicum, judged successful on the basis of Standards I-V, with children with severe special needs

. . .

(f) *Standard V.* See Section 7.04 (40) (f) above

(42) *Teacher of Children with Moderate Special Needs* (N-9) (5-12)

(a) *Requirements*

1. possession of a Massachusetts classroom teaching certificate
2. completion of a pre-practicum consisting of 30 semester hours of course work and other experiences as defined in standards I-V, below
3. completion of a half practicum (150 clock hours), judged successful on the basis of the standards, with children with moderate special needs

. . .

(f) *Standard V.* See Section 7.04 (40) (f) above.

(43) *Teacher of Children with Special Needs: Vision* (N-12)

(a) *Requirements*

1. possession of a Massachusetts classroom teaching certificate
2. completion of a pre-practicum consisting of 30 semester hours of course work and other experiences as defined in Standards I-V, below
3. completion of a half practicum (150 clock hours), judged successful on the basis of the standards, with children with special needs in vision

. . .

(f) *Standard V.* See Section 7.04 (40) (f)

(44) *Teacher of Children with Special Needs: Audition* (N-12)

(a) *Requirements*

1. possession of a Massachusetts classroom teaching certificate
2. completion of a pre-practicum consisting of 30 semester hours of course work and other experiences as defined in Standards I-V, below
3. completion of a half practicum (150 clock hours), judged successful on the basis of the standards, with children with special needs in audition

. . .

(f) *Standard V.* See Section 7.04 (40) (f)

(45) *Teacher of Children with Speech, Language, and Hearing Disorders* (All levels)

(a) *Requirements*

1. completion of 60 semester hours of course work and other experiences in the field of knowledge and pre-practicum as defined in Standards I-V, below
2. completion of a practicum, judged successful on the basis of the standards, with children with speech, language and hearing disorders, two-thirds of which may be in a clinical setting

. . .

(f) *Standard V.* See Section 7.04 (40) (f)

SOURCE: Massachusetts Register No. 162 (June 14, 1979).

603 Code of Massachusetts Regulations
Section 28, Paragraphs 322.0-322.1 (1979):

322.0 *Evaluation: IEP.*

The IEP for each child in need of special education shall be written by the TEAM and the Administrator of Special Education in accordance with the following provisions:

322.1 *Elements stated by the TEAM.*

After completion of the assessments which were part of the evaluation, and based on the results of those assessments, the TEAM shall meet to write the portion of the child's IEP for which it is responsible. That portion shall consist of the statements required by this paragraph (¶ 322.1) and any other information required by the Division.

322.1(a) A statement of the child's performance level, i.e., what the child can do.

322.1(b) A specific statement of the measurable physical constraints on such performance, i.e., what the child cannot do.

322.1(c) A specific statement describing the child's learning style.

322.1(d) A statement of the general (1 year) educational objectives and the specific (quarterly) objectives which the child can reasonably be expected to achieve. Such objectives shall be measurable and shall be listed in order of priority.

322.1(e) A statement of the suggested methodology and teaching approach for meeting the general objectives.

322.1(f) A statement of the types amd amounts of services (in terms of periods per day and per week) included within ¶ 503.1 which are necessary to enable the child to achieve the objectives, including a statement of the duration and frequency of the periods during which the child should receive the services.

322.1(g) A statement of any parent-child instruction which is necessary to enable the child to achieve the objectives. If the TEAM recommends parent-child instruction, the procedures of ¶ 323.1 shall be followed.

322.1(h) A statement of physical education services for the child, in accordance with ¶ 502.10(f).

322.1(i) A statement, in accordance with the provisions of ¶ 507.0, of the types of specialized materials and equipment necessary to enable the child to meet the objectives.

322.1(j) A statement of whether the particular services provided to the child should be provided in a classroom setting, in a small group, or on an individual basis.

322.1(k) A statement recommending the daily duration of the child's program.

322.1(l) A statement recommending the number of days per year on which the child's program should be provided, with justification if the number differs from the number of days in the regular school year.

322.1(m) A statement of the child's transportation needs, in accordance with the provisions of Chapter 9.

322.1(n) The criteria for the child's movement to the next less restrictive prototype.

603 Code of Massachusetts Regulations, Section 28, Paragraph 504.4(b) (1979):

504.4 *Placement assistance and program provision.*

504.4(b) If the Administrator of Special Education, with the assistance of the Division, cannot locate any program that can provide all elements of the child's IEP, the school committee shall request assistance from the Division in obtaining money with which to establish a program. If no such program can be located, the school committee shall, with or without outside financial assistance, establish such a program itself or through a collaborative.

603 Code of Massachusetts Regulations, Section 28, Paragraphs 700.0-700.4 (1979):

700.0 ***Provision of special education by the Division through its Bureau of Institutional Schools to resident children in institutions under the control of the Departments of Mental Health, Public Health, and Youth Services.***

The Division, through its Bureau of Institutional Schools, shall provide or arrange for the provision of special education to children in need of special education who reside in institutions under the control of the Departments of Mental Health, Public Health, and Youth Services, as defined in ¶ 108.0 of these regulations. Residential and medical services for such children that have not been recommended by the TEAM in accordance with ¶ 503.1, shall be provided by the state agency that controls the institution. The duties of the Bureau of Institutional Schools in providing special education to such children shall include:

700.1 Administering and monitoring the use of state and federal funds allocated for special education for resident children in institutions under the control of the Departments of Mental Health, Public Health, and Youth Services.

700.2 Determining the method, from the options described below, for the provision of special education to each resident child under the jurisdiction of the Bureau of Institutional Schools. Such method shall be determined in consultation with the TEAM and the Administrator of Special Education of the school committee with jurisdiction over such child (under ¶ 202.1(c)) of these regula-

tions), and the appropriate manager of institutional programs, and may utilize one or more of the following, as determined by the Bureau of Institutional Schools:

700.2(a) Staff assigned to the institution.

700.2(b) A collaborative approved by the Department of Education.

700.2(c) A public school, a Division-approved private school, a private agency, or a state or other public agency.

700.3 Insuring that special education staff providing services to resident children under the jurisdiction of the Bureau of Institutional Schools meet the requirements for certification as determined by applicable state and federal regulations.

700.4 Monitoring the overall efficiency and quality of the special education component of the programs for children in institutions under the control of the Departments of Mental Health, Public Health, and Youth Services.

603 Code of Massachusetts Regulations, Section 28, Paragraphs 802.0 - 802.19 (1979):

802.0 *Application for approval: Required information.* Each school seeking approval by the Regional Review Board shall submit in writing information required by the Division on the following:

802.1 Whether previous application for approval has been made and the action taken on it.

802.2 The physical plant of the school, including any adaptations made to accommodate children in need of special education.

802.3 Certifications of inspections issued by state agencies and the local fire inspector, and a copy of the approval by the local school committee under G.L. c. 76, s. 1.

802.4 Professional personnel with a specific statement of the qualifications of such personnel to provide for the special needs of the particular population normally served or to be served by such school. As of September 1, 1979, all newly hired professional staff must meet the approval requirements under Chapter 10. Private schools may be exempted by the Division of Special Education for any one school year from this requirement to employ certified or approved personnel when compliance therewith would, in the opinion of the Division, constitute a great hardship in securing teachers.

802.5 Instructional equipment.

802.6 Library, including facilities or holdings particularly appropriate for children in need of special education.

802.7 Enrollment.

802.8 Provisions made for medical, nursing, and infirmary care of students.

802.9 Legal status, including a statement of whether or not the school is incorporated, copies of articles of incorporation, by-laws, if any, and a statement of any tax-exempt status.

802.10 Requirements for admission.

802.11 Any certification and licensing the school has obtained.

802.12 A copy of all catalogs of the school.

802.13 Rates for all children in need of special education.

802.14 A statement that the school does not discriminate on the ground of race, color, religion, or national origin and that it does not discriminate against qualified handicapped persons.

802.15 A statement that parents and students have the same rights regarding access to, amendment of, and dissemination to third parties of student records maintained by the school as are provided with regard to public school student records by the Massachusetts Student Record Regulations; and that authorized school personnel from the responsible school system have the same right of access to those records as is provided by those regulations with regard to public school student records.

802.16 Liaison procedures for providing quarterly progress reports and annual reviews to the Administrator of Special Education of the sending school committees of children enrolled in the school.

802.17 School policies regarding suspensions, expulsion, runaways, and treatment of students with reference to experimentation, restraint, exclusion, behavior modification, and administration of drugs.

802.18 Evidence of financial solvency.

802.19 Any other information the Division may require under its guidelines for approval of private schools, or policy statements and directives issued by the Division in furtherance of this Chapter.

603 Code of Massachusetts Regulations, Section 28, Paragraphs 1000.0-1000.6 (1979):

1000.0 *Approval of certain personnel.*

From the effective date of these regulations, approvals of the following personnel will be issued by the Department of Education, in accordance with the Regulations for Approval of Professional Personnel for Special Education adopted by the Board of Education:

1000.1 Generic Special Teacher of School Age Children with Mild Special Needs.

1000.2 Administrator of Special Education.

1000.3 Teacher of School Age Children with Moderate Special Needs.

1000.4 Teacher of School Age Children with Sensory Handicaps.

1000.4(a) Vision

1000.4(b) Audition

1000.5 Instructor of School Age Children with Severe Special Needs.

1000.6 Any other approvals or certifications that may be issued in accordance with regulations adopted by the Board of Education.

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No. 80-2102

In the Supreme Court of the United States

OCTOBER TERM, 1981

SHEILA RENDELL-BAKER,
PETITIONER,
v.
SANDRA KOHN, ET AL.,
RESPONDENTS,

WAYNE KLUG, ET AL.,
PETITIONERS,
v.
NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to
The United States Court of Appeals
For The First Circuit

BRIEF FOR THE MASSACHUSETTS ASSOCIATION OF 766 APPROVED PRIVATE SCHOOLS, INC., AMICUS CURIAE

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BRIEF FOR THE MASSACHUSETTS ASSOCIATION OF 766 APPROVED PRIVATE SCHOOLS, INC., AMICUS CURIAE

Statement of Amicus Curiae

This brief urging affirmance of the judgment of the United States Court of Appeals for the First Circuit, *Rendell-Baker* v. *Kohn*, 641 F.2d 14 (1st Cir. 1981), is filed by the Massachusetts Association of 766 Approved Private Schools, Inc. ("the Association"), *amicus curiae*, with the consent of all parties.

This case calls into question, on a novel theory of state action, the right of independent and autonomous private schools to control their own educational policies. The Court of Appeals for the First Circuit rejected the petitioners' state action claims. The Association urges affirmance of the First Circuit decision to preserve the traditional independence and autonomy of its member schools and to preserve the full range of educational alternatives necessary to meet the particular needs of severely handicapped children.

The Association is a non-profit corporation chartered under Chapter 180 of the Massachusetts General Laws. The members are private elementary and secondary schools dedicated to providing educational programs and services to handicapped children, and particularly to children with severe and complex handicaps and handicaps of low incidence. More than one hundred special needs schools and treatment centers are members of the Association. Appendix A.

Members include historic innovators in the field of special education in the United States: The Perkins School for the Blind (established 1829), The New England Home for Little Wanderers (established 1865), The Boston School for the Deaf (established 1899), The Clarke School for the Deaf (established 1867), The Cotting School for Handicapped Children (established 1893). Appendix A. Other member schools have been more recently established by parents of children with special needs. New Perspectives School, Inc., a defendant in this action, is a member of the Association. Because state authorities are permitted to refer handicapped children to schools outside the Commonwealth, members of the Association have included private schools in Vermont, New York, New Hampshire, Rhode Island and Connecticut.

The Association's members are all private schools in the ordinary sense of the term. They are individually incorporated and administered by independent boards; they operate on private property; they each control their own admissions and hiring

policies; they each define and control their separate and independent educational philosophies, programs and goals. Most member schools are highly specialized and treat children with a particular range of disabilities. *See* Appendix B. Most are identified with, and implement in their programs, a particular philosophical or pedagogical approach to the difficult educational responsibilities they have assumed.

Each of the Association's member schools has been approved by the state Department of Education as a private school to which Massachusetts children requiring special education may be referred pursuant to 1972 Mass. Acts c. 766, Mass. Gen. Laws Ann. c. 71B (West Supp. 1981) ("Chapter 766").[1] All member schools accept publicly funded scholarship students referred by state and local authorities pursuant to that statute. The population of certain member schools is comprised almost exclusively of publicly funded students. The population of others is more evenly divided between children referred and paid for by the state and children referred and paid for by their parents or guardians. Some schools have a preponderance of privately funded students. Because some member schools are privately endowed or receive charitable contributions, the cost of educating even publicly funded children is not necessarily paid for entirely by the state. Some schools underwrite a portion of the cost of educating publicly funded children with their endowment funds. *See, e.g., Perkins School for the Blind* v. *Rate Setting Commission*, Mass. App. Ct. Adv. Sh. (1980), 1947, 1948-49, 411 N.E.2d 1317, 1319, *remanded* Mass. Adv. Sh. (1981) 1510, 423 N.E.2d 765.

Most Association members were established before enactment of Chapter 766. Appendix A. Historically, the Massachusetts legislature has authorized state agencies to send certain categories of handicapped children to private schools and to pay for their care and education with public funds, and various member schools have accepted publicly funded scholarship children since

[1] There are approximately fifty Chapter 766 approved schools which are not members of the Association.

the middle of the last century. The primary impact of Chapter 766 on the private schools is that it enables them to make their services available to a greater number of children, independent of charity or ability to pay.

Summary of Argument

The action of a private, independent school for handicapped children is not state action and does not become state action when it accepts publicly funded scholarship students pursuant to Chapter 766. The education of handicapped children is not a function traditionally exclusively reserved to the state.

Traditionally, the education of handicapped children has been primarily a function of private schools. In Massachusetts, even state funded education of handicapped children has been traditionally a function of private institutions. In those limited instances in which the legislature has provided for special classes for handicapped children in the public schools, special education has been a parallel function of the private schools.

For very good reasons, Chapter 766 has not altered the traditional role of private schools in providing special education to handicapped children in Massachusetts. Private schools are uniquely situated to provide for the range of needs of seriously handicapped children and children with handicaps of low incidence. Thus, the school committees are required, under Chapter 766, to "provide or arrange for the provision of" the special education programs required by statute. The statute explicitly authorizes them to refer handicapped children to private schools and enter into purchase of service contracts to pay the cost of their education and support. Special education in Massachusetts under Chapter 766 is a dual and parallel function of public and private institutions.

Private schools providing special education to handicapped children under Chapter 766 are private institutions in the ordinary meaning of that term. The statute does not impair the traditional independence of the private schools in the management of their internal affairs. In particular, the statute and the regulations preserve intact the associational freedoms inherent in the schools' constitutionally protected status as private institutions.

Nor does the fact that these private schools receive public funding for certain of their students impair their private status. Under Massachusetts law, private schools receiving public funds for special education are private schools standing in a contractual relationship to the state. And this Court's cases have made clear that public funding, even public funding accompanied by a regulatory scheme, does not impair the private status of private institutions. An expansion of the public function doctrine to include private schools providing publicly funded special education would call into question the private status of a vast array of private entities which provide services under contracts authorized by public entitlement programs.

This Court should not abandon carefully confined public function doctrine and deem the action of the schools state action in the absence of tradition and exclusivity. Such a suggestion was rejected in *Flagg Bros.* and should not be adopted here. The exclusivity requirement provides an operational basis of decision that is necessary where public and private functions are parallel and intermingled and particularly necessary where, as here, private schools may provide special education to a mix of privately funded and publicly funded students.

Furthermore, the action of private special education schools can not be deemed state action because private schools have not been delegated a function the state is obligated to perform. Chapter 766 does not obligate the state to provide special education within its own institutions. As stated, the statute explicitly authorizes the state to discharge the obligation to "provide or arrange for the provision of" special education through contractual arrangements with private institutions. There is no allegation that the state has delegated any function that the statute obligates it to perform: to identify children with special needs, to propose an education plan, to refer a child to an appropriate school, and to pay for the education and support if provided by a private school. On the contrary, the case is predicated on the state having performed all of these functions. The concept of a "delegated function" is inapplicable to this case.

The petitioners' suggestion that the court abandon all traditional tests of state action should be summarily rejected. The balancing test proposed by the petitioners is not a test of state action at all, but a determination of the merits of a lawsuit *assuming* the existence of state action. The proposed test avoids decision of precisely the issue at hand, whether the action of a private school is state action subject to the constraints of the Fourteenth Amendment.

In any event, were the Court to adopt a balancing test in this case, the interest of preserving maximum opportunity for individual choice far outweighs the claims of the plaintiffs. Because different children thrive and succeed in different educational settings, and because of the range of disabilities the schools are called upon to meet, a wide range of autonomous and independent educational alternatives for handicapped children is essential to the success of the statutory scheme.

Argument

I. The Fourteenth Amendment Is Inapplicable to a Private, Independent School Providing Special Education for Handicapped Children Because the Action of the School Is Not State Action.

A. *The Action of a Private, Independent School Providing Special Education for Handicapped Children Is Not State Action Under the Public Function Doctrine.*

1. *The Action of a Private School Providing Special Education Is Not State Action Because Special Education Is Not a Function Traditionally Exclusively Reserved to the State.*

The petitioners, all former teachers in a private secondary school providing special education for handicapped children,

have brought suit under the Fourteenth Amendment to the Constitution of the United States challenging the authority of the school to further its independent educational policies by dismissing members of its faculty. As the petitioners concede, the decision of the First Circuit dismissing this suit can be overturned only if the action of the school is deemed to be state action. Petitioners' Brief ("Br."), at 13. The restraints of the Fourteenth Amendment are applicable only "against State laws and acts done under State authority"; the amendment "erects no shield" against private conduct. *Civil Rights Cases*, 109 U.S. 3, 13 (1883); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172 (1972). Unless the actions of this private school are held to be the actions of the state, the state action requirement of the Fourteenth Amendment protects the defendants' rights of privacy and free association and their right to pursue independent educational policies free from interference by the state.

The petitioners press their Fourteenth Amendment claims against the school solely under a public function theory of State action.[2] In order for the action of an independent, private school to be deemed the action of the state under the public function doctrine, the state must have delegated to the school a function "traditionally exclusively reserved to the State." *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). Special education in Massachusetts, like education generally, is not now nor has it ever been a function exclusively reserved to the state. Private, independent schools in the Commonwealth historically have provided special education for handicapped children from Massachusetts and elsewhere who, as a general rule, would not otherwise have received any appropriate

[2] As the petitioners do not challenge the decision of the First Circuit Court of Appeals, *Rendell-Baker* v. *Kohn*, 641 F.2d 14 (1st Cir. 1981), on any other grounds, the Association will not address any other theory of state action in this brief. However, the Association urges affirmance of the decision of the First Circuit on all grounds. The petitioners have not, on any theory, met their threshold burden of establishing that the action of the school was state action under the Fourteenth Amendment. *Cf. Polk County* v. *Dodson*, 50 U.S.L.W. 4077 (December 14, 1981).

education. The fact that these private schools may accept publicly funded scholarship children referred to by state agencies under purchase of service contracts does not convert these private institutions into an arm of the state.

Traditionally, the education of handicapped children in Massachusetts has never been the exclusive function of the public schools. On the contrary, handicapped children have generally been exempted from compulsory education laws,[3] and have been routinely excluded from public schools. *Rendell-Baker* v. *Kohn*, 641 F.2d 14, 26 (1st Cir. 1981). *See also Pennsylvania Association of Retarded Children* v. *Commonwealth of Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills* v. *District of Columbia Board of Education*, 348 F. Supp. 866 (D.D.C. 1972). Such public education of handicapped children as has existed in Massachusetts has been narrowly circumscribed and authorized only pursuant to statutes, many of recent origin, which provided for special education of children with particular and limited categories of handicaps and in limited educational settings.[4] By way of example,

[3] 1939 Mass. Acts c. 461, as amended, Mass. Gen. Laws Ann. c. 76, §1. Prior to the enactment of Chapter 766, the Massachusetts compulsory education law exempted from required attendance in school "a child whose physical or mental condition is such as to render attendance inexpedient or impracticable. . . ." 1972 Mass. Acts c. 766, §12 subjected this exclusion to the provisions of Mass. Gen. Laws Ann. c.71B, §3. Similar exemptions from compulsory attendance laws historically have existed throughout the states. *See* Kotin, L. & Aikman, William L., *Legal Foundations of Compulsory School Attendance*, National University Publications, Kennekat Press, Ft. Washington, N.Y. & London, 1980

[4] In 1919, the several school committees were directed to provide special classes for mentally retarded children in every town where there were ten or more mentally retarded children. (1919 Mass. Acts c. 277). The threshold number of mentally retarded children requiring the provision of special classes was reduced to five in 1954. (1954 Mass. Acts c. 514, §5). Special classes for deaf children were required in 1923 (1923 Mass. Acts c. 361), limited, until 1952, to six towns in the Commonwealth (1952 Mass. Acts c. 498) and until 1957, were not required in cities and regional school districts (1957 Mass. Acts c. 615). Special classes for crippled children were provided in 1930 (1930 Mass. Acts c. 368), were authorized, but not required, for hearing defective children in 1938 (1938 Mass. Acts c. 313), were provided for emotionally disturbed children (if there were five or more such children) in 1960 (1960 Mass. Acts c. 750), were authorized, but not required, for learning impaired children in 1966 (1966 Mass. Acts c. 647, §1) and for speech impaired children in 1967 (1967 Mass. Acts c. 761).

there was no public special education for physically handicapped children in Massachusetts until 1930, for emotionally handicapped children until 1960, or for learning impaired children until 1966.[5] Prior to each of these enactments, and for children whose handicaps did not fall within the categories recognized from time to time by statute, and where public special education was authorized but not provided, the special education of handicapped children was provided, if at all, exclusively in private institutions. Even within the categories of disability for which public education was provided by the legislature, the education of handicapped children continued to be—and was acknowledged by the legislature to be—a parallel function of the private schools.[6]

Not even the education of handicapped children with public funds in Massachusetts has traditionally been the exclusive function of the public schools. Pursuant to statutes enacted from time to time since 1867,[7] the legislature has authorized the use of public funds for the purpose of educating handicapped children in private institutions.[8] The Department of Education, on the

[5] *See* n.4, *supra*.

[6] *See, e.g.*, Mass Gen. Laws Ann. c. 71, former §§46A and 46H (West 1969), limiting the education of physically and emotionally handicapped children to children "not otherwise provided for"; Mass. Gen. Laws Ann. c. 71, former §46B (West 1969), providing for publicly supported transportation for handicapped children attending non-public schools.

[7] 1867 Mass. Acts c. 311, §1 authorized the governor to send deaf mutes or deaf children, at the expense of the Commonwealth, to the Clarke Institution for Deaf-Mutes or to "such other schools as may be established in the Commonwealth."

[8] The Constitution of Massachusetts, while prohibiting public aid to private schools generally, explicitly permits the Commonwealth and its political subdivisions to make payments to private hospitals, infirmaries, or institutions for the deaf, dumb or blind. Art. 18 of the Amendments, as amended by Art. 46 and Art. 103. Notwithstanding repeated efforts to prohibit public funds to flow to private institutions altogether, the Constitutional Convention of 1917 retained a provision permitting the use of state funds for certain specialized education to handicapped children, Art. 46, §3. *See Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. (1981) 502, 508-11, 417 N.E.2d 408, 411-13.

request of a child's parents or guardians and with the approval of the governor, historically has been authorized to send deaf, dumb, blind, and aphasic persons, and persons with multiple handicaps to private schools within or without the Commonwealth and to pay for their education and support, and has been authorized to make tuition payments for children enrolled in specific private schools which are members of the Association: the Clarke School for the Deaf, the Horace Mann School at Boston, the Beverly School for the Deaf, the Boston School for the Deaf, the Perkins School for the Blind. Mass. Gen. Laws Ann. c. 69, former §26 (West 1969).[9]

More recently, the legislature has made public funds available to reimburse the towns or school districts for one half of the cost of educating children who attend clinical nursery schools, day care centers, or other institutions for the care, education, or treatment of retarded children conducted by accredited schools or colleges within the Commonwealth (1954 Mass. Acts c. 514, §3),[10] and has authorized the expenditure of public funds for the education of emotionally disturbed children, learning impaired children, and physically handicapped children in private schools, hospitals, sanitoria, or like institutions within or without the Commonwealth. 1960 Mass. Acts c. 750, §1; 1966 Mass. Acts c. 647; 1968 Mass. Acts c. 695.[11]

The enactment of Chapter 766 has not altered the traditional role of private schools in providing special education to handicapped children in Massachusetts. While Chapter 766 requires a school committee to offer an alternative form of education to every special needs child that has been denied admission or continued attendance in the public schools, such alternative forms of education are not required to be provided in the public schools.[12] On the

[9] Mass. Gen. Laws Ann. c. 69, former §26 (West 1969) was repealed and supplanted by 1972 Mass. Acts c. 766, which contains essentially the same provisions.

[10] Mass. Gen. Laws Ann. c. 69, former §29B (West 1969).

[11] Mass. Gen. Laws Ann. c. 71, former §§46I, L, and M (West 1969).

[12] Chapter 766 requires the school committee to "provide *or arrange for* the provision of" the special education programs required by statute. Mass. Gen. Laws c. 71B, §3 (emphasis added).

contrary, if it is not within the "cost effective capabilities of public education" to provide the full range of required special education programs within their own institutions, the various school committees are expressly authorized, with the consent of the affected parents or guardians, to enter agreements with "any public or private school, agency or institution" to provide the necessary special education within a city, town or school district. Mass. Gen. Laws Ann. c. 71B, §4; *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. (1981) 502; 504; 417 N.E.2d 408, 410. In addition, at the request of the affected parents or guardians, and with the approval of the State Department of Education, the school committees may refer children requiring special education "to any institution within or without the commonwealth" and enter into purchase of service contracts with such institutions to pay the cost of education and support actually rendered. Mass. Gen. Laws Ann., c. 71B, §10. *Commonwealth* v. *School Committee of Springfield, supra*, Mass. Adv. Sh. (1981) at 504-06, 511; 417 N.E.2d at 410-11, 417.

The regulations of the Department of Education make it perfectly clear that the school districts are not expected to provide either day school programs or residential school programs within their own institutions. Such regulations provide that the child "be placed in a program at a facility other than a public school regular education facility." 603 CMR 502.5(a), 502.6(a). (A-40, 41). *Compare also* 603 CMR 502.4 ("Each school committee *shall provide*. . . substantially separate" programs for certain handicapped children within the schools) with Sections 502.5 and 502.6 ("Each school committee *shall arrange for the provisions of*" day school programs and residential school programs). (emphasis added) (A-37, 39, 41). Consistent with these regulations, during the school year 1977-1978, 3,958 students were placed in day school programs and 1,569 were placed in residential programs outside the public school system statewide. *Commonwealth* v. *School Committee of Springfield, supra*, at 507, n.8, 417 N.E.2d at 411. As of February 18, 1981, no school system in Massachusetts had developed a residential special education program in the public

schools. *Id.*, n.7. For the grievously and multiply handicapped child in Massachusetts, special education is now, as it has been traditionally, exclusively the function of the private schools.

There are very good reasons for the legislature's decision to preserve access to private special education schools within the parameters of Chapter 766. Private institutions are uniquely situated to provide the range of services contemplated by the legislature in enacting Chapter 766, including the highly specialized education required for children with severe handicaps of low incidence. As the petitioners acknowledge, private institutions historically have been sufficiently free of "orthodoxy and bureaucracy" to develop and apply innovative techniques for the education and training of severely disturbed children.[13] Br. at 40. The private schools are sufficiently varied in size, philosophy, and educational mission to meet the range of needs presented by handicapped children in the Commonwealth. Appendix B; *Commonwealth* v. *School Committee of Springfield*, *supra*, Mass. Adv. Sh. (1981) at 506, 417 N.E.2d at 411.

In addition, the existence of the private schools gives substance to the statutory rights of parents to participate in the educational choices made for their handicapped children and to advocate for their needs. Chapter 766 was enacted pursuant to a legislative finding that "the present inadequacies and inequities in the provision of special education services to children with special needs have resulted largely from a lack of significant parent and lay involvement in overseeing, evaluating and operating special educational programs." 1972 Mass. Acts c. 766, §1. Consistent with this finding, the legislature has provided for significant and substantial parent participation in the choice and design of special education programs for handicapped children. Parents of handicapped children are entitled to obtain, at state expense, an independent evaluation of their child's needs; to challenge, at a hearing, any

[13] Albert E. Trischman, "The Walker School: An Education Based Model," *Child Care Quarterly*, Vol. 5, No. 2; Summer, 1976; Jack R. Gannon, *Deaf Heritage, A Narrative History of Deaf America*, National Association of the Deaf, Silver Spring, Maryland, 1981, pp. xxi-xxxi, 1-58.

evaluation made by the state; to reject the education program suggested by the state; to elect a regular school program for their child; or to select an alternative special education placement in a private school. Mass. Gen. Laws Ann. c. 71B, §3; *Amherst-Pelham Regional School Committee* v. *Department of Education*, 376 Mass. 480 (1978), 381 N.E.2d 922. By statute, parents are entitled to appeal to the state Department of Education and to the state courts to obtain a particular placement for their child, and the Department and the courts are empowered to order the school committee to provide the education that the parents have concluded is in their child's best interests. *Id.*

Absent the existence of private and independent schools which offer a range of educational programs for handicapped children, the rights of parents to pursue alternative forms of special education for their children would be without substance, and the legislative intent to provide a sufficiently flexible program to meet the particular needs of handicapped children would be frustrated. The legislature, in enacting Chapter 766 and mindful of the difficulty of the educational task at hand, determined to preserve the traditional role of private institutions in educating handicapped children in the Commonwealth.

Given the foregoing, there is no basis on which to conclude that special education in Massachusetts is a function "traditionally exclusively reserved to the state." Special education historically has been a function performed primarily by private institutions, and is now a function performed by public and by private schools. Because the education of handicapped children is not traditionally an exclusive state function, the action of a private school which provides such education is not state action under the public function doctrine developed by this Court. *Flagg Bros., Inc.* v. *Brooks*, *supra; Jackson* v. *Metropolitan Edison Co.*, *supra.* As the petitioners rely solely on a public function theory of state action to advance their claim that New Perspectives School is subject to the Fourteenth Amendment, the judgment of the First Circuit dismissing their claims should be affirmed.

The petitioners attempt to avoid the conclusion required by *Flagg Bros.* by the extraordinary expedient, which appears throughout their brief, of declaring that the special education provided in private schools is "public education".[14] This argument simply begs the principal question raised in this case: whether Chapter 766 has converted traditionally private institutions into public actors.

The private school which is the subject of this dispute, and the members of the Association, are private institutions "in the ordinary meaning of that term." *Moose Lodge No. 107* v. *Irvis*, *supra*, 407 U.S. at 171. They are independent corporate bodies, independently governed, operating on private property. *See. e.g.*, *Rendell-Baker* v. *Kohn*, *supra*, 641 F.2d at 16-17. Many of the private special education schools in Massachusetts were established prior to the enactment of Chapter 766; several in the last century. Appendix A. Historically, they have provided, and continue to provide, special education for handicapped children independent of the provisions of Chapter 766 or any prior program of government funding. None have surrendered their right to pursue independent policies because they have accepted students on state funded scholarships. *Rendell-Baker* v. *Kohn*, *supra*, 641 F.2d at 25.

In enacting Chapter 766, the Legislature preserved not only the traditional role of private institutions in providing special education to handicapped children, but also the traditional independence of the private schools in the management of their own

[14] In this regard, the petitioners place principal reliance on *Ambach* v. *Norwick*, 441 U.S. 68 (1979). But *Ambach* does not assist their cause. *Ambach* decides that a state may, within the constraints of the Equal Protection Clause, preclude aliens from teaching in the public schools. The case rests on a conclusion that education provided in *public* schools is a public function. The case says nothing whatever about education provided in private schools and nowhere suggests that private schools become state actors where they have agreed to educate publicly funded schoolchildren referred to them by the state. If anything, *Ambach* preserved the distinction between the public and private spheres in education, in that the Court relied for its decision on the existence of a private sector, independent of state regulation, where alien teachers would be permitted to teach.

internal affairs, particularly where necessary to preserve freedom of association and philosophical integrity. For example, Chapter 766 does not authorize the state to control the educational policies of the schools or to direct or advance any educational philosophy,[15] or to require the admission of any particular student,[16] or to require the hiring or firing of any faculty,[17] or to require the adoption of any particular educational program.[18]

On the contrary, as it pertains to private schools, the statutory scheme requires only that the school committees identify school age children with special needs, that they propose an individual educational plan to meet those needs, and that they seek out, when necessary to implement that plan, an appropriate private place-

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[15] With regard to educational policy, a private school seeking approval as a Chapter 766 provider is only required to submit:

> "a complete behaviorally specific description of the education and treatment services which it is prepared to offer to children in need of special education, including a statement of the types of educational goals it is prepared to help such children achieve; the methods it will use to achieve such goals; and the provision for instruction, regular liaison with an involvement of parents in the program of each child." 603 CMR 803.1. *See also* Department of Education Guidelines for Approval of Private Schools Under Chapter 766 ("Guidelines"), Section 200.01. (A-43).

[16] The administrator of special education in any school district is responsible for finding an appropriate placement for a child. If unable to do so:

> "he/she may request assistance from the Division by submitting a letter to the appropriate Regional Branch Office of the Division requesting assistance and listing any schools that have been considered and the reason(s) given by the schools for not accepting the child." 603 CMR §504.4(a). (A-42).

[17] The regulations of the Department require only that the school have available in writing its current personnel policies and practices. "Guidelines", §201.01. (A-44). "The content of the school's policies, including criteria and procedures for hiring and firing, has been left to the discretion of the school's management." *Rendell-Baker* v. *Kohn*, *supra*, 641 F.2d at 25.

[18] Chapter 766 requires that the curriculum at an approved private provider of special education be "equivalent, insofar as the department deems feasible, to the curriculum for children of comparable age and ability in the public schools of the commonwealth." Mass. Gen. Laws Ann. c. 71B, §10. However, the same standard is required of all private schools in the commonwealth which are approved as alternatives to the public schools under the compulsory education law. Mass. Gen. Laws Ann. c. 76, §1.

ment for the child. Mass Gen. Laws Ann. c. 71B, §3; 603 CMR 504.2. If the state or school committee refers a child to a private school, and if the school agrees to accept the child, the school committee may enter into a purchase of service contract with the school, wherein the school committee agrees to pay the school the cost of the education and services actually rendered to the child and the school agrees to comply with all elements of the child's individual educational plan. Mass. Gen. Laws Ann. c. 71B, §10; 603 CMR 504.2(c). (A.-42). While the state may thus direct a particular educational program for a child, if the school committee is dissatisfied with any private placement, its only recourse is to remove the child from the program. Mass. Gen. Laws Ann. c. 71B, §3.[19] The school committee is not empowered to alter the educational program offered by the school.

In sum, although the state requires compliance with a considerable body of regulatory material whenever a private school enters into a contract to provide education to a child referred pursuant to Chapter 766, *Rendell-Baker* v. *Kohn*, *supra*, 641 F.2d at 25,[20] the state has refrained from regulating in those areas which

[19] Section 3 of Chapter 71B provides for periodic evaluation of a child's progress in an educational program. "If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned."

[20] The First Circuit found as follows:

> Plaintiffs would have us infer state domination from the regulations to which the school is subject. The school is regulated by a number of state and local agencies, and some of these regulations are very detailed. But we are not persuaded that the school's "freedom of decision-making has . . . been circumscribed substantially more than that generally accorded an independent contractor." *McQueen* v. *Drucker*, 438 F.2d at 784-85. The degree of state regulation here is not greater than that exercised over the utility in *Jackson* v. *Metropolitan Edison*, 419 U.S. 345. Each of the various kinds of regulations to which the school is subject would apply as well to a private institution which contracted with the state to educate one student or to conduct one small program in return for a small amount of funds. . . . [A]spects of the school's operation which do not relate directly to services to students are left to the discretion of the school's privately appointed management, just as other government contractors are left free to manage their own affairs so long as they provide the services for which they have contracted." 641 F.2d at 25.

would impinge on the educational independence or philosophical integrity of the private schools. *See Farrington* v. *Tokushige*, 273 U.S. 284, 298 (1927); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). The private schools remain free, within the statutory scheme, to control their own affairs. *Rendell-Baker* v. *Kohn*, *supra*, at 25.

Given that the operation of private schools providing special education is independent of state control, the petitioners' contention that Chapter 766 education provided in private schools is "public" education and "traditionally exclusively a function of the state" rests on the fact that such education is publicly funded.[21]

The petitioners' advance two arguments in support of this contention, neither of which takes into account the fact that publicly funded special education has, in Massachusetts, traditionally been a function of private schools as well as public institutions.

The petitioners' first argument is, in substance, that publicly funded special education is a function exclusively reserved to the state because the state has an exclusive call on public funds. The argument is tautological. The question is not whether the state has

[21] The petitioners admit as much in the question they have presented for review and in their brief:

> "[I]t should not be necessary to find that the function of providing *publicly funded* special education was traditionally exclusively reserved to the state..."; "The state's delegation to an ostensibly private school of its statutory obligation to provide *publicly funded special education* must not be confused with the routine sharing of the state's educational duties with ordinary private schools." Br. at 21 and 17, n. 21 (emphasis added).

The petitioners place some minimal reliance on two other factors in attempting to distinguish private special education schools from private schools generally. *See* Br. at 17, n. 21. They argue that private special education schools are distinguished from private schools because special education is available to handicapped children "by right" and that handicapped children are "assigned" to the private schools they attend.

Regarding the first point, publicly funded education is available to all children "by right". Special education pursuant to Chapter 766 is not an exception to that rule. On the contrary, Chapter 766 was enacted to conform the rights of handicapped children to the rights of children generally.

Nor does the assertion that handicapped children may receive public funding only at an "assigned" school distinguish private special education schools from private schools generally. Handicapped children are not assigned to private schools. They are referred. The schools are not required to accept any student.

the exclusive "power and duty" to provide special education with public funds, but whether publicly funded tuition payments for special education under purchase of service contracts converts private schools into state actors. The cases conclusively establish that public funding does not achieve that result.

Under Massachusetts law, private schools receiving public funds for special education remain private schools. *See, Commonwealth* v. *School Committee of Springfield, supra* (upholding the constitutionality, under the Massachusetts Constitution, of providing public funds to private special education schools); *Perkins School for the Blind* v. *Rate Setting Commission, supra*, Mass. App. Ct. Adv. Sh. (1980) at 1953, 411 N.E.2d at 1322; Mass. Adv. Sh. (1981) at 1513 (private schools providing special education to state funded children are providers of service standing in a contractual relationship to the state).

Moreover, this Court has consistently recognized that financial support of a private entity is insufficient to constitute state action, even where such support is accompanied by extensive regulation. *See Jackson* v. *Metropolitan Edison Co., supra*, 419 U.S. at 369-70 (Marshall, J., dissenting). And, while a state may be precluded from providing aid to private schools which discriminate on the basis of race,[22] or where aid would entangle the state in the religious affairs of a sectarian school, private schools receiving state aid under public entitlement programs are not thereby converted into state actors, even where such aid is deemed to benefit the school and not the student. *Norwood* v. *Harrison*, 413 U.S. 455 (1973).[23]

[22] Of course, there is no suggestion in this case that the Legislature enacted Chapter 766 in order to advance any unconstitutional activity or that the statute furthers an improper purpose.

[23] Thus, a state may provide funds and services, including funds and services for special needs children, to sectarian schools so long as the funds are used for secular purposes and the state is not excessively entangled in the religious affairs of the school. *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736 (1976); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Wolman* v. *Walter*, 437 U.S. 229 (1977). A necessary premise of these cases

Apart from the absence of any supporting authority, the argument advanced by the petitioners would prove far too much. Special education is but one of many public entitlement programs where the state provides services through purchase of service contracts with private vendors. A rule of state action which turned on the fact that the state has the exclusive "power and the duty" to spend public funds for such purposes would call into question the private status of an extraordinary range of public service providers, all of which receive fee-for-service payments under legislative entitlement programs regulated by state agencies.[24] A rule extending the public function doctrine to the facts of this case has no rational stopping place and should not be adopted. *See Jackson* v. *Metropolitan Edison Co.*, *supra*, 419 U.S. at 350, n. 7, and 354.

The petitioners' second argument is that publicly funded special education is exclusively a function of the state because a handicapped child may receive publicly funded education at a school approved by the state "and nowhere else." Br. at 25. In this regard, the petitioners would have this Court conclude that an independent school, one of scores of such schools in the Commonwealth, exercises monopoly power over a handicapped child.

This Court, of course, has rejected monopoly status as a test of state action. *Jackson* v. *Metropolitan Edison Co.*, *supra*, 419 U.S.

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is that the receipt of public funds does not impair the private status of private schools. Were this not so, sectarian schools receiving public funds could not fulfill their religious mission. *Stone* v. *Graham*, 449 U.S. 39 (1980).

[24] In Massachusetts alone, at least the following private enterprises would be affected: landlords (106 CMR 305.151 et. seq. (AFDC)), utilities (106 CMR 305.151 et. seq. (AFDC)), fuel suppliers (106 CMR 309.190); grocers (106 CMR 311-14, specifically 311.140 and 314.150 authorizing vendor payments (General relief)); home health care providers (106 CMR 403.401, specifically 403.411); doctors (106 CMR 450.301-02 (Medicaid)); pharmacists (106 CMR 466.001 et. seq.); chair car transporters and taxis (106 CMR 474.018 et seq. and 475.014 et seq. (Medical Assistance)); day care centers (Mass. Gen. Laws Ann. c. 28A, §5). Specifically under Chapter 766, the petitioners' rule would reach pediatricians, psychologists, and social workers who perform core evaluations of handicapped children pursuant to Mass. Gen. Laws Ann. c. 71B, §3; 106 CMR 481.001, 009. *See Bello* v. *South Shore Hospital*, Mass. Adv. Sh. (1981) 2411, 2418.

at 351-52. Were the petitioners correct, the warehouse in *Flagg Bros.* would have been a state actor, because Mrs. Brooks could replevy her furniture from the Flagg Bros. warehouse and nowhere else, and the power company in *Jackson* would have been a state actor because the company was the exclusive source of electric power in certain portions of its service area. *See The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 57 at 129, n. 46 (1978). That, of course, is not the law.

In any event, a monopoly analysis of state action has no application to the facts of this case. No single educational institution has "exclusive control over the exercise of the function" of providing special education. *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. at 129. Nor is monopoly analysis theoretically relevant to this case. Monopoly analysis of state action is derived from the view that the Fourteenth Amendment's state action provision was intended "to regulate the exercise of centralized power — a kind of power that might be consciously employed to foreclose individual competition in a free market." Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 Wash. U.L.Q. 757, 766. Chapter 766 has the opposite effect. It preserves the autonomy and independence of the private schools. It insures a handicapped child's access to private schools regardless of his ability to pay. It provides procedures and a forum whereby parents can advocate for their own individual conception of their child's best interest apart from the determination of public institutions.

In short, neither special education, nor even publicly funded special education, is a function traditionally exclusively reserved to the state. Special education, including publicly funded special education, is now and has been traditionally a function of private institutions as well as the public schools. Under this Court's public function doctrine, private schools providing such education are therefore not state actors and their actions are not subject to the restraints of the Fourteenth Amendment.

2. *Tradition and Exclusivity Are Necessary to a Finding of State Action Under the Public Function Doctrine.*

The petitioners have attempted to evade the holding in *Flagg Bros.* by arguing that special education is a public function which satisfies the state action requirement without regard to tradition and exclusivity. The argument is foreclosed. In *Flagg Bros.* this Court rejected the view, adopted by the Second Circuit Court of Appeals as the basis for its decision, that "state action might be found in the exercise by a private party of 'some power delegated to it by the State which is traditionally associated with sovereignty.' " *Flagg Bros., Inc.* v. *Brooks, supra*, 436 U.S. at 155. This Court reversed the Second Circuit's holding that the warehouse in *Flagg Bros.* was a state actor without regard to exclusivity and "carefully confined" the public function doctrine to those instances in which a private actor was delegated a function that traditionally *exclusively* was reserved to the state. *Flagg Bros.* v. *Brooks, supra*, 436 U.S. at 161, 163.[25]

The Court should not abandon carefully confined doctrine in resolving this case. As the Court has recognized: ". . . The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions." *Jackson* v. *Metropolitan Edison Co., supra*, 419 U.S. at 354, n.9. The exclusivity test provides a necessary operational rule of decision where, as here, parallel private and public functions occur.

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[25] The petitioners contend that this case presents the question reserved in *Flagg Bros.* It does not. That question reserved is whether the state might be free to delegate "functions administered with a greater degree of exclusivity by the state and municipalities and thereby avoid the strictures of the Fourteenth Amendment." *Flagg Bros., Inc.* v. *Brooks, supra*, at 163-164. That question preserves the requirement of exclusivity. Because special education, including publicly funded special education, is not a function that has been exclusively administered by the state, and because no state function has been delegated to a private entity (*see* Argument Part I(A)(3)), this case does not present the question reserved in *Flagg Bros.*

An exclusivity test is particularly necessary where, as here, individual private schools provide special education to a mix of publicly funded and privately funded handicapped children. Schools which accept even one publicly funded student operate within an identical contractual arrangement with the state as do schools with one hundred percent publicly funded students.[26] But a doctrine that would convert a private school which accepts one publicly funded student into a state actor simply makes no sense. There could be no factual basis for finding that such a school operated as a public institution.

Nor, absent the requirement of exclusivity, could a public function doctrine be confined to any particular class of institutions providing services under a public entitlement program. As shown (note 24, *supra*), privately owned day care centers, nursing homes, fuel companies, pharmacies, apartment buildings all provide contract services to the public under governmental entitlement programs analogous to the program at issue here. The exclusivity rule is necessary to protect the private rights of these entities from governmental intrusion.

In sum, unless the state action requirement is written out of the Fourteenth Amendment, it is necessary under the Constitution to preserve the distinction between action by the state and private conduct. *Moose Lodge No. 107* v. *Irvis*, *supra*, 407 U.S. at 172. Because "many functions have been traditionally performed by governments," *Flagg Bros., Inc.* v. *Brooks*, *supra*, 436 U.S. at 158, and because there are many governmental functions performed by private entities, the unbounded rule of state action advanced by the petitioners seriously imperils this basic constitutional principle. *See Evans* v. *Newton*, 382 U.S. 296 (1966) (Harlan, J., dissenting). On the other hand, a public function doctrine of state action that requires a private entity to have been delegated a function traditionally and exclusively performed by the state preserves the constitutionally protected freedoms guaranteed to private entities and preserves access to Fourteenth Amendment protections

[26] *See Rendell-Baker* v. *Kohn*, *supra*, 461 F.2d at 25.

in appropriate cases. Particularly where, as here, the protected freedoms at issue are First Amendment rights of association traditionally the subject of this Court's protection, *see Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the public function doctrine of state action should not be expanded.

3. *The Action of a Private, Independent School Providing Special Education Is Not State Action in Any Event Because No Exclusive Function of the State Has Been Delegated.*

In order for the action of a private school to be deemed state action subject to the constraints of the Fourteenth Amendment, this Court's cases require that there has been a delegation of a function traditionally and exclusively reserved to the state. Even the petitioners concede that for a private school to be subject to the Fourteenth Amendment, it must have been "delegated" some "public function". Br. at 17. In this regard, the petitioners assert, without examination or analysis, that the state and its political subdivisions have delegated to a private entity their "statutory obligations to provide suitable public education to students with special learning needs." Br. at 14. The assertion is erroneous. Neither the state nor its political sub-divisions has delegated any of their statutory obligations.

Chapter 766, which is the sole authority for the petitioners' position, requires a school committee to provide "or arrange for the provision of" an appropriate, publicly supported education to each school aged child with special needs. Mass. Gen. Laws Ann. c. 71B, § 3; *Commonwealth* v. *School Committee of Springfield*, *supra*, at 504-07, 417 N.E.2d at 410-11. The statute does not obligate the state to provide special education within its own institutions. On the contrary, the state is expressly permitted, through its departments and the several school committees, to discharge the obligation to provide for special education for school age children with special needs through a variety of means,

including referral to private institutions. Mass. Gen. Laws Ann. c. 71B, § 10. As a corollary, the statute provides parents with procedures and a forum in which to advocate for private alternative education for their handicapped children. *Id.*, § 3; *Amherst-Pelham Regional School Committee* v. *Department of Education*, *supra*, 376 Mass. 480, 381 N.E.2d 922.

Given this statutory scheme, there is no sense in which it is proper to say that the state, by referring children to private schools for special education and by paying the cost of instruction and support rendered to them, has delegated a duty which it is obligated to perform. There is no allegation that the state has delegated its duty to identify school aged children with special needs, or its duty to refer a child to an appropriate school, or its duty to approve a school, or its duty to abide by the procedures required by statute, or its duty to pay for the education and support provided by private schools. *Id.*, §§ 3, 10. On the contrary, this case is predicated on the state having performed the functions required of it by statute: the state has referred certain handicapped children to New Perspectives School and it has paid for the education provided by that institution to those children.

More broadly, this is not a case in which the state has historically performed a function which it has now determined to delegate to private entities. As shown, the state has not, as a historical matter, provided either the day school programs or the residential programs performed by private schools. In this respect, the instant case is fundamentally distinguishable from *Evans* v. *Newton*, where the issue presented was whether the "momentum [the park] acquired as a public facility [was] dissipated" by the appointment of private trustees. 382 U.S. 296, 301 (1966). It was critical to the decision in *Evans* v. *Newton* that the state had attempted to divest itself of a function it had previously performed. The instant case presents opposite circumstances. In enacting Chapter 766, the legislature has extended the availability of state funded private education. It has not delegated to private institutions a function the state had previously performed.

As no function previously performed by the state has been delegated, the petitioner's concept of a "delegated function" is inapplicable to this case. For this independently sufficient reason, the action of a private school providing special education pursuant to Chapter 766 is not state action and not subject to the Fourteenth Amendment.

B. *The Action of a Private, Independent School Providing Special Education for Handicapped Children Is Not State Action Under the Petitioners' Proposed "Balancing of Interests" Test.*

1. *Balancing of Interests Is Not an Appropriate Substitute for Traditional Tests of State Action.*

The petitioners have proposed not only that the Court abandon the carefully confined boundaries of the public function doctrine of state action, but that it abandon all traditional tests of state action in resolving this case. Apparently conceding that the action of a private school which provides special education to state funded scholarship children may not be state action under any of this Court's doctrinal precedents, the petitioners have proposed a new standard: that where there are present some traditional indicia of state action, the Court balance the interests competing for protection to decide the state action question. Br. at 31.

At the outset, it should be noted that the petitioners have not invented a theory of state action. As they acknowledge, this "revisionist" approach to state action has been proposed at least since 1967.[27] Nonetheless, and for very good reasons, this Court has not adopted a balancing of interests test in resolving state action ques-

[27] *See* Black, *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69 (1967); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. Cal. L. Rev. 208 (1957). More recent commentators have criticized the "revisionist" proposals as unworkable and theoretically unsound. *See* Choper, *Thoughts on State Action, The "Government Function" and "Power Theory" Approaches*, *supra*, 1979 Wash. U.L.Q. 757; *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 57 (1978).

tions. *See Jackson* v. *Metropolitan Edison Co.*, *supra*, at 373 (Marshall, J. dissenting); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 190 (1970) (Brennan, J., concurring and dissenting). Indeed, there are several difficulties with the proposed balancing of interests test which strongly counsel against its adoption.

First, the balancing test proposed by the petitioners is fundamentally circular. As applied, it is not a test of state action at all, but a determination of the merits of a lawsuit *assuming* the existence of state action. Thus, assuming there are present some minimum traditional indicia of state action, the petitioners would have the Court abandon any effort to determine the existence of state action and move directly to consider the merits of a plaintiff's claim.

In the instant case, assuming again some minimum indicia of state action, the Court would be required to balance the teachers' free speech claims against the school's right to formulate and implement its considered view that dissension and turmoil in the school environment are therapeutically contra-indicated for the particular handicapped children for whom the school has undertaken the responsibility of education and care. (*See* J.A. 30-31). The right inherent in a private school to make and implement such a judgment is firmly established. *Pierce* v. *Society of Sisters*, *supra; Meyer* v. *Nebraska*, *supra*. Absent state action, the school is free to develop and implement an independent philosophy of education, even where those policies may conflict with the goals of the majority or further goals the state would be forbidden to pursue. *Evans* v. *Newton*, *supra*, 382 U.S. at 300; *Norwood* v. *Harrison*, *supra*, 413 U.S. at 469. The difficulty is that the petitioners would have this Court balance established rights inherent in the private schools against rights which the petitioners claim to have, but which, in the absence of state action, are not protected by the Constitution. In this way, the "balancing of interests" test avoids decision of precisely the constitutional question it purports to decide. The effect of the test, if adopted, would be to write the state action requirement out of the Fourteenth Amendment.

Second, the petitioners' proposal would draw the federal courts even further into disputes that are primarily private in character. This is so because so much of the private affairs of men and women today are touched by some measure of governmental involvement or control. Thus, a rule which required the federal courts to "balance" the merits of individual claims against associational rights whenever there were present some undefined minimum of traditional indicia of state action would inevitably subject a wide range of private relationships to constitutional scrutiny and control. Such an incursion of the federal judiciary, particularly under a highly questionable theory of state action, should be resisted. *See* Choper, *Thoughts on State Action*, *supra*, at 760-65.

Third, the proposed "balancing of interests" test is an inadequate guide for individual conduct. Under the proposed test, the school would inevitably find itself a state actor with respect to some of its students and not others. Where institutional decisions had to be made which crossed the lines between public and private categories, the institution would be forced to relinquish, for all categories of its students, certain of its rights to self-determination.

For example, as relevant here, if a decision to terminate a teacher for disruptive behavior is likely to be subjected to constitutional scrutiny, a school might well hesitate to take such an action, even though, in its judgment, such a course would be in the best interests of publicly funded and privately funded students alike. In this way, the values protected by the state action requirement — absence of orthodoxy and independence from bureaucratic controls — would be jeopardized for all students, even though parents of some privately funded students would have chosen the school for its adherence to a particular pedagogic view. As a practical matter, the rule proposed by the petitioners would convert private institutions into state actors categorically, notwithstanding the protections of the state action requirement. The petitioners' proposal should be rejected.

2. *Were the Court to Apply a Balancing of Interests Test to this Case, the Decision of that Circuit Dismissing the Petitioners' Claims Would be Affirmed.*

Were the Court to apply a balancing of interests test in this case, it would be required to balance the petitioners' First Amendment claims against the First Amendment associational rights of the school. "Private parties performing functions affecting the public interest can often make a persuasive claim to be free of the constitutional requirements applicable to governmental institutions because of the value of preserving a private sector in which the opportunity for individual choice is maximized." *Jackson* v. *Metropolitan Edison Co.*, *supra*, 419 U.S. at 372 (Marshall, J., dissenting). This case presents just such an instance. The schools' claim to paramount rights in this First Amendment tug of war rests on the indubitable benefits to be derived from the existence of independent, autonomous private schools which can meet the full range of needs of severely handicapped children.

The particular benefits to be derived from the private schools is recognized in Chapter 766 and incorporated in the regulations governing their approval as providers of special education under the statute. Thus, a school seeking approval as a Chapter 766 provider is required to "keep and maintain" a written statement identifying its educational philosophy, goals, and objectives. Guidelines for Approval of Private Schools Under Chapter 766, Section 200.01; 603 CMR 803.1 (A-43). This statement is required to be made available to parents of handicapped children and to each public school referring children to the private institution. *Id.* A school's educational policy is thus recognized as an essential component of its qualifications as an appropriate school for any given handicapped child.

This emphasis on educational philosophy is derived from the particular educational tasks that special education schools have undertaken to perform. The private day and residential schools treat and educate very seriously handicapped children: children with severe emotional handicaps, minimal intellectual function,

multiple and severe physical and sensory disorders, severe learning disabilities, serious social dysfunctions. *See* Appendix B. There is no unanimity of opinion as how best to care for and educate these children.[28] Even with respect to children with less severe handicaps, there is lack of unanimity as to the best course of care and treatment. Because different children thrive and succeed in different education settings, it is essential to the success of a program like Chapter 766 that there be a wide range of educational and treatment alternatives for handicapped children. Such considerations provide the underlying basis of the schools' First Amendment rights. Freedom of association in the broadest sense is necessary not only to the success of the individual schools, it is necessary to the success of the statutory scheme.

There is a second reason why the schools' associational rights are essential to the success of Chapter 766. As discussed above, Chapter 766 was enacted pursuant to a legislative determination to foster significant parent and lay involvement in special education programs. 1972 Mass. Acts c. 766, § 1.

Thus, the statute provides both a forum and procedures whereby parents can be advocates for the best possible educational alternative for their children. Mass. Gen. Laws Ann. c. 71B, § 3. If these proceedures are to achieve the legislature's purposes in involving parents and lay persons, there must be a range of alternatives available from which parents can choose and advocate for the program best suited to their child's individual needs. The value of the private schools in the statutory scheme depends on the individual differences among the schools and on their right to pursue independent educational programs and goals.

Weighed against these values and purposes are the individual teachers' claim of a right to "express their professional opinions, in

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[28] *See, e.g.*, G. Paul and R. Lentz, *Psychological Treatment of Chronic Mental Patients: Milieu Versus Social Learning Programs*, Harvard University Press, Cambridge, 1977; Jack R. Gannon, *Deaf Heritage, A Narrative History of Deaf America*, "War of Methods", National Association of the Deaf, Silver Spring, Maryland, 1981, pp 359-67 (history of oralist versus total communication methodology and the development of American Sign Language).

private and in public, concerning the educational process and how it might be improved." Br. at 38. But, as the petitioners acknowledge, these private school teachers have elected to teach in private schools. They are not required to do so. As a general proposition they would earn more were they to teach in the public schools.[29] Nevertheless, whether because of a personal commitment to the educational philosophy at a particular private school, or because of a disdain of the perceived "orthodoxy and bureaucracy of public education," or because private schools generally provide a "healthy alternative to a homogeneous public school system," Br. at 40, these teachers have not elected to teach in an environment in which their rights to freedom of expression are protected by the Constitution. For so long as they elect to eschew the public schools and teach in private institutions, they have no claim to the protections of the Fourteenth Amendment. They have shown no reason, nor could they, why a private school, and particularly a private school providing special education to handicapped children, should not be free to pursue its own educational goals and implement its own educational policies. A balancing of the interests seeking protection in this case weighs heavily in favor of the school.

Conclusion

For all the foregoing reasons, the decision of the First Circuit Court of Appeals in *Rendell-Baker* v. *Kohn*, 641 F.2d 14 (1st Cir. 1981), should be affirmed.

Respectfully submitted,

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[29] Gail Merrithew, "National Association of Independent Schools Trend Study, Teacher Salaries, 1980", *Education Week*, Vol. 1 No. 13, December 7, 1981, at 17.

APPENDIX A

The Massachusetts Association of 766 Approved Private Schools

INDEX OF MEMBERS

School	*Date of Establishment*
AMEGO, Inc. Day Educational Program Quincy, Massachusetts	Established 1972
AMEGO, Inc. Residential Program Hingham, Massachusetts	Established 1976
AMIC Day School Newton Center, Massachusetts	Established 1973
Arlington School Arlington School/Adolescent Day Service/Waverly House Belmont, Massachusetts	Established 1961
Avalon School Monterey, Massachusetts	Established 1947
Basics, Inc. Boston, Massachusetts	Established 1975
Bay Cove Day Care Center for Children Boston, Massachusetts	Established 1976
Baylies Beginning Center Canton, Massachusetts	Established 1972

School	*Date of Establishment*
Beacon School Brookline, Massachusetts	Established 1973
Behavior Research Institute Providence, Rhode Island	Established 1971
Berkshire Learning Center Pittsfield, Massachusetts	Established 1972
Berkshire Children's Community Great Barrington, Massachusetts	
Beverly School for the Deaf Beverly, Massachusetts	Established 1876
Boston Center for Blind Children Boston, Massachusetts	
Boston College Campus School Chestnut Hill, Massachusetts	Established 1970
Boston School for the Deaf Randolph, Massachusetts	Established 1899
Braintree Mini and PACE Memorial Schools Braintree, Massachusetts	Established 1973
Braintree St. Coletta Day School, Inc. Braintree, Massachusetts	Established 1957
Brandon School Natick, Massachusetts	Established 1966
Cape Cod Child Development Program Hyannis, Massachusetts	Established 1975
Cardinal Cushing School and Training Center Hanover, Massachusetts	Established 1947
Carroll School Lincoln, Massachusetts	Established 1884

School	*Date of Establishment*
Carroll-Hall School Cambridge, Massachusetts	Established 1957
Castle School Cambridge, Massachusetts	Established 1978
Center for Alternative Education Boston, Massachusetts	Established 1969
F.L. Chamberlain School Middleboro, Massachusetts	Established 1976
Charles River Academy Cambridge, Massachusetts	Established 1965
Christ Church Professional Nursery for the Handicapped Andover, Massachusetts	Established 1973
Clarke School for the Deaf Northampton, Massachusetts	Established 1867
Clearway School West Newton, Massachusetts	Established 1975
Community Center for Children with Special Learning Disabilities West Newton, Massachusetts	Established 1967
Community Preschool Therapeutic Nursery Brookline, Massachusetts	Established 1974
Concord-Assabet School, Inc. Concord, Massachusetts	Established 1976
Cotting School for Handicapped Children Boston, Massachusetts	Established 1893
Crotched Mountain Rehabilitation Center Greenfield, New Hampshire	Established 1953

School	*Date of Establishment*
Crystal Springs School, Inc. Assonet, Massachusetts	Established 1954
D-R Mini School Rehoboth, Massachusetts	
Deaconess Home School Fall River, Massachusetts	
Dearborn Elementary School Cambridge, Massachusetts	Established 1949
Dearborn Pre-Vocational Unit Cambridge, Massachusetts	Established 1970
DeSisto of Stockbridge West Stockbridge, Massachusetts	Established 1978
Devereux Schools Rutland, Massachusetts	Established 1965
Dimock Street Preschool Roxbury, Massachusetts	Established 1969
Eagle Hill School Hardwick, Massachusetts	Established 1967
Early Beginning Center Canton, Massachusetts	Established 1974
The Eagleton School Great Barrington, Massachusetts	Established 1979
East Mountain Center Westfield, Massachusetts	
Efficacy Research Institute Taunton, Massachusetts	Established 1975
Efficacy Research Institute of Framingham Framingham, Massachusetts	Established 1980
EWT School (Experiment with Travel) Springfield, Massachusetts	Established 1970
Farr Academy Cambridge, Massachusetts	Established 1972

School	*Date of Establishment*
Fitchburg Center for Brain Injured Children Fitchburg, Massachusetts	Established 1972
Gifford School and Day Care Center Weston, Massachusetts	Established 1965
The Harbor Schools Newburyport, Massachusetts	Established 1965
The Charles Hayden School Dorchester, Massachusetts	Established 1932
The Holden School Charlestown, Massachusetts	Established 1976
Holy Union Special School North Chelmsford, Massachusetts	Established 1967
The Institute for Family and Life Learning Danvers, Massachusetts	Established 1973
Institute Day School at Lowell Lowell, Massachusetts	Established 1965
Italian Home for Children Jamaica Plain, Massachusetts	Established 1919
Kennedy Centers for Handicapped Children Foxboro, Massachusetts	Established 1971
Kennedy Memorial Hospital Day School Brighton, Massachusetts	Established 1964

School	*Date of Establishment*
Robert F. Kennedy Action Corps Boston, Massachusetts	Established 1969
The Kolburne School, Inc. New Marlborough, Massachusetts	Established 1947
Laboure Center South Boston, Massachusetts	Established 1907
Lakeside School West Peabody, Massachusetts	Established 1967
Landmark School Beverly, Massachusetts	Established 1971
Language and Cognitive Development Center Jamaica Plain, Massachusetts	Established 1965
Lawrence Rehabilitation Services Center Lawrence, Massachusetts	Established 1969
League School of Boston Newtonville, Massachusetts	Established 1966
The Learning Center for Deaf Children Framingham, Massachusetts	Established 1970
Learning Center for the Multiply Handicapped Watertown, Massachusetts	Established 1949
The Ledges Hopedale, Massachusetts	Established 1959
Leland Hall School Norfolk, Massachusetts	Established 1974
Lincoln Hill Day School Foxboro, Massachusetts	

School	*Date of Establishment*
Linden Hill School Northfield, Massachusetts	Established 1961
Little House Alternative School Dorchester, Massachusetts	Established 1973
Longview Farm Walpole, Massachusetts	
Lovering School Taunton, Massachusetts	Established 1979
The Lynnshore School Lynn, Massachusetts	Established 1972
Madonna Hall Marlboro, Massachusetts	Established 1867
Mann Unit Jackson-Mann School Allston, Massachusetts	Established 1975
Manville School Boston, Massachusetts	Established 1957
Maple Valley School Wendell Depot, Massachusetts	Established 1973
Massachusetts Association for the Blind Deaf/Blind Program Brookline, Massachusetts	Established 1971
Massasoit School Norwood, Massachusetts	
Mathoms Adolescent Day Treatment Program Brockton, Massachusetts	Established 1975
May Institute for Austistic Children, Inc. Chatham, Massachusetts	Established 1955

School	*Date of Establishment*
McAuley Nazareth Home for Boys Leicester, Massachusetts	Established 1901
Milford Assistance Program Milford, Massachusetts	Established 1974
Mill Pond School Springfield, Massachusetts	Established 1976
Nazareth Child Care Center Jamaica Plain, Massachusetts	Established 1864
Nazareth Hall and Vocational Center Fall River, Massachusetts	Established 1957
Nazareth Hall-on-the-Cape Hyannis, Massachusetts	Established 1960
New England Home for Little Wanderers Boston, Massachusetts	Established 1865
New Perspectives School, Inc. Brookline, Massachusetts	Established 1971
Norfolk Clinical Children's Center Westwood, Massachusetts	Established 1958
Northampton Center for Children and Families Northampton, Massachusetts	Established 1975
Open Road School Waltham, Massachusetts	
Osborn Day School West Springfield, Massachusetts	Established 1973

School	*Date of Establishment*
Doctor Franklin Perkins School Lancaster, Massachusetts	Established 1896
Perkins School for the Blind Watertown, Massachusetts	Established 1829
Project EISEC University Hospital, Inc. Boston, Massachusetts	Established 1977
Protestant Youth Center Baldwinville, Massachusetts	Established 1961
Residential Rehabilitation Centers, Inc. Brewster, Massachusetts	Established 1970
River Street School Hyde Park, Massacusetts	Established 1972
Riverview School East Sandwich, Massachusetts	Established 1957
St. Ann's Home, Inc. Methuen, Massachusetts	Established 1925
St. Anne's School of Arlington, Inc. Arlington, Massachusetts	Established 1928
St. Mary's Home for Children New Bedford, Massachusetts	Established 1894
St. Vincent's Home and School Fall River, Massachusetts	Established 1894
Schools for Children Cambridge, Massachusetts	Established 1949
South Shore Center for Brain-Injured Children Braintree, Massachusetts	Established 1975

School	*Date of Establishment*
Spaulding Youth Center Tilton, New Nampshire	Established 1958
Edna Stein Academy Brookline, Massachusetts	Established 1971
Anne Sullivan Center Tewksbury, Massachusetts	Established 1971
Therapeutic Center for the Multiply Handicapped Brookline, Massachusetts	Estsblished 1974
Thom Montessori School Boston, Massachusetts	Established 1921
The Kathleen Thornton School Springfield, Massachusetts	Established 1964
Valley View Farm North Brookfield, Massachusetts	Established 1970
Valleyhead, Inc. Lenox, Massachusetts	Established 1969
Walker Home and School Needham, Massachusetts	Established 1962
Warren Center Brookline, Massachusetts	
Robert White School Boston, Massachusetts	Established 1972
Willie Ross School for the Deaf, Inc. Longmeadow, Massachusetts	Established 1967
Willow Hill School Sudbury, Massachusetts	Established 1970
Wreath School Middleton, Massachusetts	Established 1973

APPENDIX B

The Massachusetts Association of 766 Approved Private Schools

DISABILITY CLASSIFICATION INDEX

ALL SPECIAL NEEDS
Braintree St. Coletta Day School

ALTERNATIVE HIGH SCHOOL
Little House Alternative School
New Perspectives School
Open Road School

APHASIC
Boston School for the Deaf
Fitchburg Center for Brain-Injured Children, Inc.
Kennedy Memorial Hospital
Learning Center for Multiply Handicapped
Leland Hall School

AUTISTIC
Amego, Inc.—Day Educational Program
Amego, Inc.—Residential Program
Avalon School
Devereux Schools
Efficacy Research Institute
Fitchburg Center for Brain-Injured Children, Inc.
League School
May Institute for Autistic Children
PACE
Project EISEC
Spaulding Youth Center

BEHAVIORAL AND PHYSICAL NEEDS
Osborn Day School

BEHAVIORALLY DISORDERED
Bay Cove Day Center
Braintree Mini School
Dearborn Prevocational Unit
Devereux Schools
Farr Academy
Gifford School
Harbor School
Holden School
Institute for Family and Life Learning
Italian Home for Children
Madonna Hall
Mathoms
Nazareth Child Care Center
Nazareth Hall-on-the-Cape
New England Home for Little Wanderers
New Perspectives School
Open Road School
Residential Rehabilitation Centers
St. Ann's Home
St. Mary's Home for Children
St. Vincent's Home and School
Spaulding Youth Center
Valley View Farm
Walker Home and School
Wreath School

BLIND
Learning Center for Multiply Handicapped
Mass. Assoc. for the Blind
Perkins School for the Blind
Project EISEC

DEAF
Beverly School for the Deaf
Boston School for the Deaf
Clarke School for the Deaf
Learning Center for Deaf Children
Learning Center for the Multiply Handicapped
Mass. Assoc. for the Blind
Perkins School for the Blind
Wille Ross School for the Deaf

DEVELOPMENTAL DISABILITIES
Avalon School
Dimock Street Pre-School
Fitchburg Center for Brain-Injured Children, Inc.
Nazareth Hall and Vocational Center
South Shore Center for Brain-Injured Children
Anne Sullivan Center

DYSLEXIA
Beacon School
Carroll School
Landmark School

EMOTIONALLY DISTURBED
AMIC Day School
Arlington School

EMOTIONALLY DISTURBED (Continued)
Avalon School
Bay Cove Day Center
Beacon School
Behavior Research Institute
Berkshire Learning Center
Boston-Brookline Collaborative
Boston College Campus School
Carroll Hall School
F. L. Chamberlain School
Charles River Academy
Community Pre-School Therapeutic Nursery
Concord-Assabet School
D-R Mini School
Walter F. Dearborn Elementary School
Dearborn Prevocational Unit
Dearborn Secondary Program
Devereux Schools
Efficacy Research Institute
EWT—Experiment with Travel
Farr Academy
Gifford School
Harbor School
Charles Hayden School
Holy Union Special School
Institute for Family and Life Learning
Italian Home for Children
Kolburne School
Lakeside School
League School
Little House Alternative School
Madonna Hall
Manville School

EMOTIONALLY DISTURBED (Continued)
Mathoms
McAuley Nazareth Home
Milford Assistance Program
Mill Pond School
Nazareth Child Care Center
Nazareth Hall-on-the-Cape
New Perspectives School
Norfolk Clinical Center
Northampton Center for Children and Families
Open Road School
Osborn Day School
Our Lady of Providence Children's Center
Dr. Franklin Perkins School
Residential Rehabilitation Centers
St. Ann's Home
St. Anne's School
St. Mary's Home for Children
St. Vincent's Home and School
Spaulding Youth Center
Kathleen Thornton School
Valley View Farm
Valleyhead
Walker Home and School
Robert White School
Wreath School

HEARING IMPAIRED
Boston College Campus School
Mann Unit—Jackson Mann School

LANGUAGE IMPAIRED
Dimock Street Pre-School
League School
Learning Center for the Deaf
Little House Alternative School
Valleyhead

LEARNING DISABLED
Beacon School
Berkshire Learning Center
Boston-Brookline Collaborative
Carroll School
Carroll-Hall School
F. L. Chamberlain School
Charles River Academy
Walter F. Dearborn Elementary School
Dearborn Secondary Program
Eagle Hill School
Efficacy Research Institute
Farr Academy
Gifford School & Day Center
Charles Hayden Inn School
Kolburne School
Landmark School
Learning Center for Multiply Handicapped
Leland Hall
Linden Hill School
Madonna Hall
Mathoms
Nazareth Child Care Center
Nazareth Hall-on-the-Cape

LEARNING DISABLED (Continued)
Riverview School
St. Mary's Home for Children
St. Vincent's Home and School
Willow Hill
Wreath School

LEARNING IMPAIRED
Holden School
Learning Center for the Deaf
Little House Alternative School
Valleyhead

MENTALLY RETARDED
Boston College Campus School
Learning Center for the Multiply Handicapped
South Shore Center for Brain-Injured Children

MILDLY EMOTIONALLY DISTURBED
Basics, Inc.
Dearborn Secondary Program

MILDLY RETARDED
Holden School
League School
Anne Sullivan Center

MODERATELY RETARDED
Holden School
Dr. Franklin Perkins School

MULTIPLY HANDICAPPED
Boston College Campus School
Christ Church Professional Nursery
Crystal Springs School
Holy Union School
Kennedy Center for Programs in Early Development
Learning Center for Multiply Handicapped Children
Mass. Assoc. for the Blind

PERCEPTUALLY HANDICAPPED
Beacon School
Eagle Hill School
Holy Union School
Landmark School
Leland Hall

PHYSICALLY HANDICAPPED
Baylies Beginning Center
Cotting School
Holy Union School
Kennedy Memorial Hospital
South Shore Center for Brain-Injured Children
Anne Sullivan Center
Valleyhead

PRESCHOOL FOR MULTIPLY HANDICAPPED
Dimock Street Pre-School
Early Beginning Center
Kennedy Center for Programs in Early Development
Anne Sullivan Center

RETARDED
Devereux Schools
Efficacy Research Institute
Kennedy Center for Programs in Early Development
Residential Rehabilitation Centers

SEVERELY MULTIPLY HANDICAPPED
Crotched Mountain Rehabilitation Center
Fitchburg Center for Brain-Injured Children
Project EISEC
South Shore Center for Brain-Injured Children

SOCIAL/EMOTIONAL/ACADEMIC PROBLEMS
Center for Alternative Education

APPENDIX C

Constitutional, Statutory, and Regulatory Provisions

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Massachusetts General Laws, Chapter 69, former Section 26 (West 1969):

The department may, upon the request of the parents or guardians and with the approval of the governor, send such deaf, such blind and such aphasic persons as it considers proper subjects for education, for a term not exceeding twelve years to the American School at Hartford, for the Deaf, in the State of Connecticut, to the Clarke School for the Deaf at Northampton, to the Horace Mann School at Boston, to the Beverly School for the Deaf at Beverly, to the Boston School for the Deaf at Randolph, the Rhode Island School for the

Deaf, at Providence, Rhode Island, to any other school for the deaf or school affording remedial treatment for the deaf within or without the commonwealth, as the parents or guardians may prefer, or to the Perkins School for the Blind or any other school within or without the commonwealth which provides instruction to the blind; or to any school within or without the commonwealth which provides instruction for aphasic persons; provided, that each of said schools shall offer in the ninth, tenth, eleventh and twelfth years an educational curriculum equivalent to that in the secondary schools of the commonwealth, as determined by the department. Upon like request and with like approval, the department may continue for a longer term the instruction of any of such persons who are meritorious pupils recommended by the principal or other chief administrator of the school which they attend. With the approval of the governor the department may, at the expense of the commonwealth, make such provision for the care and education of children who are both deaf and blind or both mentally retarded and blind as it may deem expedient. No such pupil shall be withdrawn from such institutions or schools except with the consent of the authorities thereof or of the department; and the expenses of the instruction and support of such pupils therein, actually rendered or furnished, including their necessary traveling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, shall be paid by the commonwealth; but the parents or guardians of such children, who are able wholly or in part to provide for their support and care, to the extent of their ability may be required by the department to reimburse the commonwealth therefor.

Amended by St.1935, c. 286; St.1945, c. 524; St.1951, c. 673, § 6A; St.1952, c. 498, § 1; St.1957, c. 582; St.1958, c. 508; St.1964, c. 497.

Repealed by St. 1972, c. 766, § 8, recodified as Chapter 71B, §§ 8, 10, 13.

Massachusetts General Laws, Chapter 69, former Section 29B (West 1969):

One half of the cost of the expenses of the instruction, training and support of the children in the special classes or special instruction periods provided under section forty-six, forty-six A, forty-six H, forty-six K, and forty-six L of chapter seventy-one, and sections twenty-nine and thirty-two of this chapter, actually rendered or furnished, including their necessary traveling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, shall be reimbursed to the towns or any regional school district by the commonwealth upon approval of the department and certification by it that such classes or special instruction periods meet the standards and requirements prescribed by it. The department shall reimburse a city or town in which resides a child who attends a clinical nursery school established under section thirteen B of chapter one hundred and twenty-three or a child who, because of insufficient class room space in a community clinical nursery school, attends a clinical nursery school, day care center or other institution for the care, education or treatment of retarded children conducted by an accredited school or college within the commonwealth, as provided in said section thirteen B, or a retarded person who attends an educational, habilitational or day care program or facility of the department of mental health, as provided under section thirteen C of said chapter one hundred and twenty-three, by paying to it one half the cost of the transportation of each such child and the full cost of each such adult to and from such educational, habilitational or day care program or facility, as the case may be, on each day it is in session.

Added by St.1954, c. 514, § 3. Amended by St.1955, c. 626, § 1; St.1956, c. 535, § 1; St.1957, c. 615, § 3; St.1960, c. 627; St.1960, c, 750, § 2; St.1966, c. 501, § 2; St.1966, c. 647, § 2; St.1967, c. 874, § 1; St.1968, c. 617, § 1.

Repealed by St. 1972, c. 766, § 8, recodified as Chapter 71B, §§ 5, 8, 13.

Massachusetts General Laws, Chapter 71, former Section 46I (West 1969):

The department may, upon the request of the parents or guardians and with the approval of the governor, send such emotionally disturbed children as it considers proper subjects for education to any school, hospital, sanatorium or like institution, within or without the commonwealth, affording remedial treatment for emotionally disturbed children for terms not exceeding twelve years, under regulations prescribed by the departments of education and mental health. The department may, upon like request and with like approval, continue for longer terms the education of any children therein who are meritorious pupils recommended by the principal or other chief administrative officer of such school, hospital, sanatorium or like institution.

The expenses of the instruction and support of such children therein, actually rendered or furnished, including their necessary traveling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, shall be paid by the commonwealth; but the parents or guardians of such children, who are able wholly or in part to provide for their support and care, to the extent of their ability may be required by the department to reimburse the commonwealth therefor.

Added by St.1960, c. 750, § 1.

Repealed by St. 1972, c. 766, § 10, recodified as Chapter 71B, §§ 3, 10.

Massachusetts General Laws, Chapter 71, former Section 46L (West 1969):

The department, under regulations prescribed jointly by the departments of education, public health, and mental health, and upon the request of the parents or guardians and with the approval of the governor, may send such children having the specific learning disabilities described in section forty-six K as it considers proper subjects for special training and instruction

to any school wothin the commonwealth affording remedial treatment for such children. The department may continue the special education of such children for such terms as may be recommended by the principal or other chief administrative officer of such school.

Added by St.1966, c. 647, § 1.

Repealed by St.1972, c. 766, § 10, recodfied as Chapter 71B, §§ 3, 10.

Massachusetts General Laws, Chapter 71, former Section 46M (West):

The department may, upon the request of the parents or guardians and with the approval of the governor, send such physically handicapped children as it considers proper subjects for education to any school, hospital, sanatorium or like institution, within the commonwealth, affording remedial treatment for physically handicapped children for terms not exceeding twelve years, under regulations prescribed by the departments of education and public health. The department may, upon like request and with like approval, continue for longer terms the education of any children therein who are meritorious pupils recommended by the principal or other chief administrative officer of such school, hospital, sanatorium or like institution.

The expenses of the instruction and support of such children therein, actually rendered or furnished, including their necessary traveling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, shall be paid by the commonwealth out of the proceeds of the tax on income; but the parents or guardians of such children, who are able wholly or in part to provide for their support and care, to the extent of their ability, may be required by the department to reimburse the commonwealth therefor.

Added by St.1968, c. 695.

Repealed by St. 1972, c. 766, § 10, recodified as Chapter 71B, §§ 3, 10.

Massachusetts General Laws, Chapter 71B, Section 1 (West Supp. 1981):

The following words as used in this chapter, unless the context requires otherwise, have the following meanings: "Department", the department of education; "School age child", any person of ages three through twenty-one who has not attained a high school diploma or its equivalent; "School age child with special needs", a school age child who, because of temporary or more permanent adjustment difficulties or attributes arising from intellectual, sensory, emotional, or physical factors, cerebral dysfunctions, perceptual factors, or other specific learning disabilities or any combination thereof, is unable to progress effectively in a regular school program and requires special classes, instruction periods, or other special education services in order to successfully develop his individual educational potential; "Regular education", the school program and pupil assignment which normally leads to college preparatory or technical education or to a career; "Special education", educational programs and assignments, namely special classes, programs or services designed to develop the educational potential of children with special needs including but not limited to educational placements of children by school committees, the departments of public health, mental health, and youth services and the department of social services in accordance with the regulations of the department of education; "School age child requiring special education", any child with special needs who requires special education as determined in accordance with the regulations set forth by the department.

Added by St.1972, c. 766, § 1. Amended by St.1978, c. 552, § 18.

Massachusetts General Laws, Chapter 71B, Section 2 (West Supp. 1981):

The department shall promulgate, in cooperation with the departments of mental health, public health and social services, regulations regarding programs for children with special

needs including but not limited to a definition of special needs; provided, however, that such definition shall emphasize a thorough narrative description of each child's developmental potential so as to minimize the possibility of stigmatization and to assure the maximum possible development of a child with special needs, and, provided further, that such definition shall be sufficiently flexible to include children with multiple special needs. Children receiving or requiring special education shall be entitled to participate in any of the following programs: (1) additional direct or indirect instruction consultation service, materials, equipment or aid provided children or their regular classroom teachers which directly benefits children requiring special education; (2) supplementary individual or small group instruction or treatment in conjunction with a regular classroom program; (3) integrated programs in which children are assigned to special resource classrooms but attend regular classes to the extent that they are able to function therein; (4) full-time special class teaching or treatment in a public school building; (5) teaching or treatment at home; (6) full-time teaching or treatment in a special day school or other day facility; (7) teaching or treatment at a hospital; (8) teaching or treatment at a short or long term residential school; (9) occupational and pre-occupational training in conjunction with the regular occupational training program in a public school; (10) occupational and pre-occupational training in conjunction with full-time special class teaching in a public school building, at home, special day school or other day facility, hospital, or short or long-term residential school; (11) any combination or modification of programs (1) through (10) or other programs, services, treatments or experimental provisions which obtain the prior approval of the department.

Admission to such programs on the pre-school level at an earlier age than at which schooling is ordinarily provided shall be regulated by the department in conjunction with the departments of public health and mental health and shall be

restricted to children with substantial disabilities who are judged by said departments to require such programming.

No child shall be assigned to a special education class unless it is first determined by an evaluation of the child's needs and the particular special education program that the child is likely to benefit from such program; periodically thereafter, and in no event less often than annually the child and his program shall be reevaluated to determine whether said child is benefiting from said program in accordance with the procedures set forth in section three. In the event that said program is not benefiting the child and that another program may benefit the child more, or said program has benefited the child sufficiently to permit reassignment, the child shall be reassigned, and in the event of consistent failure of a program to benefit children there assigned, the program shall be abolished or altered.

Added by St.1972, c. 766, § 11. Amended by St.1978, c. 552, § 19.

Massachusetts General Laws, Chapter 71B, Section 3 (West Supp. 1981):

In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health and public health and with assistance of the department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise, every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education.

No school committee shall refuse a school age child with special needs admission to or continued attendance in public school without the prior written approval of the department. No child who is so refused shall be denied an alternative form of education approved by the department, as provided for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency or through any other program which is approved for the child by the department.

No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department.

Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining whether such child requires special education, the school committee shall notify the parents or guardians of such child in writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the department and the departments of mental health and public health and the right to appeal from any evaluation, first to the department, and then to the courts.

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as

may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist.

The department jointly with the departments of mental health and public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the needs of the child is provided.

Those persons assessing said child shall maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education and medical treatment best suited to the child's needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counseling services. When the suggested course of study is other than regular education those persons assessing said child shall present a method of monitoring the benefits of such special education and conditions that would indicate that the child should return to regular classes, and a comparison of expected outcomes in regular class placement.

If a child with special needs requires medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available, in accordance with regulations promulgated jointly by the departments of education, mental health, public health and social services in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made according to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the depart-

ments of mental health and public health or, at private expense, from any specialists.

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluation, shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate education program. At the conclusion of said hearing, with the advice and consultation of appropriate advisory councils established under section one P of chapter fifteen, the department may recommend alternative educational placements to the parents, guardians or persons with custody, and said parents, guardians and persons with custody may either consent to or reject such proposals. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parents, guardians or persons with custody except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such a showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

If the parents, guardians or persons with custody reject the educational placements recommended by the department and desire a program other than a regular education program, the

matter shall be referred to the state advisory commission on special education to be heard at its next meeting. The commission shall make a determination within thirty days of said meeting regarding the placement of the child. If the parents, guardians or persons with custody reject this determination, they may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child shall be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

Within ten months after placement of any child in a special education program, and at least annually thereafter the child's educational progress shall be evaluated as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned.

Evaluations and assessments of children and special education programs shall remain confidential and be used solely for the administration of special education in the commonwealth, including, but not limited to, inspection by the department and regional and state advisory councils to insure that every special education program does benefit the children there assigned.

Added by St.1972, c. 766, § 11. Amended by St.1978, c. 552, § 20.

Massachusetts General Laws, Chapter 71B, Section 4 (West Supp. 1981):

The school committee of any city, town or school district may, to meet its obligations under section three, with the approval of the department enter into an agreement with any other school committee to jointly provide special education or, subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, may enter into an agreement with any public or private school, agency, or institution to provide the necessary special education within the city, town or school district.

In the case of an agreement between school committees to jointly provide special education, said agreement shall designate one city, town or school district as the operating agent. Funds received by such operating agent from other cities, towns or school districts or appropriated by such operating agent for the purposes of such agreement, in addition to gifts and grants shall be deposited with and held as a separate account by its treasurer. The school committee may apply said funds to the costs of programs operated pursuant to the agreement without further appropriation.

Added by St.1972, c. 766, § 11.

Massachusetts General Laws, Chapter 71B, Section 10 (West Supp. 1981):

The department may, on an annual renewal basis, upon the request of the parents or guardians and the recommendations of a local school committee and a regional branch of the division of special education, and with the approval of the secretary of educational affairs refer children requiring special education to any institution within or without the commonwealth which offers curriculum, instruction and facilities which are appropriate to the child's needs and which are approved by the department under regulations prescribed by the departments of education, mental health and public health. The curriculum at such an institution must for approval be

equivalent, insofar as the department deems feasible, to the curriculum for children of comparable age and ability in the public schools of the commonwealth.

Before acting on said request the department shall determine the nature and extent of a child's special needs, shall require the local school committee and regional advisory council to prepare and submit plans detailing the time needed to establish facilities adequate for children with special needs in the city, town or school district where the child resides, and shall ascertain whether adequate facilities and instruction programs are available or when adequate facilities can be made available in the city, town or school district where the child with special needs resides. Until adequate facilities can be made available, such child shall be placed in the most aequate program available as determined by the department. The department shall further define by regulation the circumstances in which it shall be directly responsible for the placement of children in such special education programs, and by standards available to the public determine the methods and order of such placements; provided, however, that no child shall be denied access to any program operated by the department of mental health, public health or social services to which in the judgment of the operating department the child should be admitted.

The expenses of the instruction and support actually rendered or furnished to such children with special needs, including their necessary travelling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, may be paid by the commonwealth; but the department shall issue regulations jointly with the departments of mental health, public health, youth services and social services defining the circumstances in which the commonwealth shall bear all or part of such cost, the circumstances in which school committees shall be required to bear part or all of such cost, and the circumstances in which a parent or guardian may be required to reimburse the commonwealth for part or all of such cost; provided, however,

that in no event shall the cost to the school committee for placement under this section be less than the average per pupil cost for pupils of comparable age within the city, town or school district; and, provided further, that in determining the cost to the parent or guardian, if any, no charge shall be made for any educational cost but only for support and care. In determining the cost to the parent or guardian the department shall apply criteria which take into account relative ability to pay.

The department shall direct and supervise the education of all such children, and the commissioner of education shall state in his annual report their number, the cost of their instruction and support, the manner in which the money appropriated therefor has been expended, to what extent reimbursed and such other information as he deems important.

Nothing contained herein shall affect the continued authority of the departments of mental health and public health over all non-educational programs and all treatment for residents or patients in institutions under their control.

Added by St.1972, c. 766, § 11. Amended by St.1978, c. 552, § 21.

Massachusetts Acts and Resolves, St. 1972, c. 766, § 1.

. . .

Recognizing, finally, that present adequacies and inequities in the provision of special education services to children with special needs have resulted largely from a lack of significant parent and lay involvement in overseeing, evaluating and operating special education programs, this act is designed to build such involvement through the creation of regional and state advisory committees with significant powers and by specifying an accountable procedure for evaluating each child's special needs thoroughly before placement in a program and periodically thereafter. . . .

Massachusetts General Laws, Chapter 76, Section 1 (West Supp. 1981):

Every child between the minimum and maximum ages established for school attendance by the board of education, except a child between fourteen and sixteen who meets the requirements for the completion of the sixth grade of the public school as established by said board and who holds a permit for employment in private domestic service or service on a farm, under section eighty-six of chapter one hundred and forty-nine, and is regularly employed thereunder for at least six hours per day, or a child between fourteen and sixteen who meets said requirements and has the written permission of the superintendent of schools of the town where he resides to engage in non-wage-earning employment at home, or a child over fourteen who holds a permit for employment in a cooperating employment, as provided in said section eighty-six, shall, subject to section fifteen, attend a public day school in said town, or some other day school approved by the school committee, during the number of days required by the board of education in each school year, unless the child attends school in another town, for said number of days, under sections six to twelve, inclusive, or attends an experimental school project established under an experimental school plan, as provided in section one G of chapter fifteen, but such attendance shall not be required of a child whose physical or mental condition is such as to render attendance inexpedient or impracticable subject to the provisions of section three of chapter seventy-one B or of a child granted an employment permit by the superintendent of schools when such superintendent determines that the welfare of such child will be better served through the granting of such permit, or of a child who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee. The superintendent of schools may transfer to any specialized type of school on a full-time basis any child who possesses the educational qualifications enumerated in this section and in the opinion of the superintendent would be benefited by such transfer. The superintendent, or teachers in so far as authorized by him or

by the school committee, may excuse cases of necessary absence for other causes not exceeding seven day sessions or fourteen half day sessions in any period of six months. Absences may also be permitted for religious education at such times as the school committee may establish; provided, that no public funds shall be appropriated or expended for such education or for transportation thereto; and provided, further, that such time shall be no more than one hour each week. For the purposes of this section, school committees shall approve a private school when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town; but shall not withhold such approval on account of religious teaching, and, in order to protect children from the hazards of traffic and promote their safety, cities and towns may appropriate money for conveying pupils to and from any schools approved under this section.

Pupils who, in the fulfillment of the compulsory attendance requirements of this section, attend private schools of elementary and high school grades so approved shall be entitled to the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools and shall not be denied such transportation because their attendance is in a school which is conducted under religious auspices or includes religious instruction in its curriculum, nor because pupils of the public schools in a particular city or town are not actually receiving such transportation.

The school committee of each town shall provide for and enforce the school attendance of all children actually residing therein in accordance herewith.

The terms "permit for employment" and "employment permit", as used in this chapter, shall mean an employment permit referred to in section eighty-six of chapter one hundred and forty-nine.

Amended by St.1971, c. 437; St.1971, c.875; St.1972, c. 100, § 3; St.1972, c. 766, § 12.

REGULATORY PROVISIONS

Regulations, Massachusetts Department of Education, July, 1981. 603 Code of Massachusetts Regulations (CMR) 502:

502.4 *Substantially separate program.*

Each school committee shall provide a program within this prototype to each child in need of special education for whom the IEP specifies such a program. Programs within this prototype shall have the following characteristics:

502.4(a) The child shall be assigned to a program or programs made up entirely of children in need of special education.

502.4(b) In each program the number of children for each teacher shall not exceed eight, and for each teacher with an aide, shall not exceed twelve.

502.4(c) The ages of the youngest and oldest child in each program shall not differ by more than forty-eight months. A written request for approval of a wider age range may be made to the Division, through its Regional Branch Office, which may approve such request.

502.4(d) The grouping of children in each program shall be compatible with the methods and goals stated in each child's IEP.

502.4(e) The child shall leave the program to receive services and to participate in activities specified by the Administrator of Special Education pursuant to ¶ 322.4(e) and by the TEAM pursuant to ¶ 322.1(f).

502.4(f) The daily duration of the child's program shall be equal to that of the regular school day, unless the Administrator of Special Education states that a shorter or longer duration is in the child's best interests. In such a case the duration of the child's program shall be that specified by the Administrator of Special Education.

502.4(g) For each child placed in this prototype, the school committee shall provide or arrange to have provided, to implement the child's IEP, the personnel specified by the Administrator of Special Education.

502.4(h) Each school committee shall provide all aspects of programs within this prototype within public school regular education facilities, except as provided under ¶ 502.4(i).

502.4(i) Notwithstanding ¶ 502.4(h), a school committee may operate a substantially separate special education program in a facility other than a public school regular education facility, provided that the program is reviewed and approved by the Regional Branch Office of the Division prior to implementation. Such review and approval shall be required annually, as part of the school committee's annual program plan under ¶ 501.2. A program approved under this paragraph shall be considered more restrictive than a ¶ 502.4 program conducted in a public school regular program under ¶¶ 502.5 or 502.6. In order for a program to be approved

under this paragraph, the school committee shall submit to the Regional Branch Office of the Division written evidence that:

502.4(i)(i) The program meets the requirements of ¶¶ 502.4(a) through 502.4(g), inclusive.

502.4(i)(ii) The school committee cannot operate the program within a public school regular education facility for programmatic reasons.

502.4(i)(iii) The school committee has incorporated into the program procedures for moving the children into a public school regular education facility.

502.4(i)(iv) The facility in which the program is located has been inspected for health and safety by appropriate state agencies and the local fire inspector. A copy of the certificates of inspection shall accompany the request for approval of the program.

502.4(j) The child's program shall be conducted for the number of days in the public school year.

502.5 *Day school program.*

Each school committee shall arrange for the provision of programs within the prototype to each child in need of special education only when the nature or severity of the special need is such that education in a less restric-

tive prototype with the use of supplementary aids and services cannot be achieved satisfactorily. Programs within this prototype shall have the following characteristics:

502.5(a) The child shall be placed in a program at a facility other than a public school regular education facility.

502.5(a)(i) The child's program shall be conducted for the number of days in the public school year, unless the Administrator of Special Education states that a program with a longer or shorter duration is in the child's best interests, in accordance with ¶ 322.4(b).

502.5(a)(ii) The child's program shall have a duration of at least five hours each day unless the Administrator of Special Education states that a shorter or longer duration is in the child's best interests.

502.5(a)(iii) The child shall return each night to his or her place of residence.

502.5(a)(iv) The site of the program shall be within one hour traveling time, one-way, from the child's home; provided, however, that where the TEAM deter-

mines that a longer traveling time may be necessary, it shall make a written request for approval of such longer time to the Administrator of Special Education who may approve such request.

502.5(b) Each school committee shall arrange for the provision of all programs within this prototype through the procedures described in ¶ 504.0.

502.6 *Residential school program.*

Each school committee shall arrange for the provision of a program within this prototype to each child in need of special education for whom an IEP specifies such a program based on a finding by the Administrator of Special Education, upon recommendation by the TEAM, that a residential school program is necessary to meet the educational goals and objectives in the IEP. Programs within this prototype shall have the following characteristics:

502.6(a) The child shall be placed in a program at a facility other than a public school regular education facility and shall live in such facility.

502.6(b) The child's program shall have a duration of the number of days in the public school year, unless the Administrator of Special Education states that a program with a longer or shorter duration is in the child's best interests, in accordance with ¶ 322.4(b).

502.6(c) Each school committee shall arrange for the provision of all programs within this prototype through the procedures described in ¶ 504.0.

Regulations, Massachusetts Department of Education, July, 1981
603 Code of Massachusetts Regulations (CMR) 504:

504.2 *Procedures for day school or residential school placements.*

(c) Upon written approval of a day school or residential school placement by the Regional Branch Office of the Division and the Secretary of Educational Affairs, and upon written consent by the child's parent, the school committee shall place the child in the approved program. The school committee shall enter into an agreement or contract with the day or residential school in which the child is placed and in such agreement or contract the school shall agree to comply with all elements of the child's IEP and all applicable provisions of these regulations.

504.4 *Placement assistance and program provisions.*

(a) If the Administrator of Special Education is unable to find an appropriate placement for a child that complies with the elements of the child's IEP, he/she may request assistance from the Division by submitting a letter to the appropriate Regional Branch Office of the Division requesting assistance and listing any schools that have been considered and the reason(s) given by the schools for not accepting the child. The letter shall be accompanied by a copy of the child's IEP, copies of all assessments from the evaluation, and the designation by the Administrator of a placement specialist who will work with the Division.

Regulations, Massachusetts Department of Education, July, 1981 603 Code of Massachusetts Regulations (CMR) Chapter 8 — Private Schools:

803.0 *Application for approval: Further information required.*

Each school seeking approval by the Regional Review Board shall also submit, in writing, the following information:

803.1 A complete behaviorally specific description of the education and treatment services which it prepared to offer to children in need of special education, including a statement of the types of educational goals it is prepared to help such children achieve; the methods it will use to achieve such goals; and the provision for instruction, regular liaison with and involvement of parents in the program of each child.

Regulations, Massachusetts Department of Education, May 1, 1980 "Guidelines for Approval of Day and Residential Educational Components in Private Schools Under Chapter 766".

PART 200—GENERAL ADMINISTRATIVE REQUIREMENTS FOR EDUCATIONAL COMPONENTS

§ 200.01 *Statement of Purpose*

Each school shall keep and maintain a written statement identifying the school's philosophy, its goal and objectives, the characteristics and ages of children served, its intake procedures, termination procedures, and the process for re-entry to the public school, and the services provided. The school shall provide to each public school referring children, and the child's parent, upon request, a copy of this statement, and shall keep such statement current. . . .

PART 201— PERSONNEL POLICIES FOR DAY AND RESIDENTIAL SCHOOLS

§ 201.01 *Personnel Policies*

The school shall have available in writing its current personnel policies and practices. Such personnel policies shall include a description of:

(a) criteria and procedures for hiring and suspension or dismissal of any staff person;
(b) the procedures for handling staff complaints;
(c) provisions for vacations, holidays, leaves, sick days, and any other benefits or requirements maintained by the school.